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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court (App. B, *infra*) is reported at 360 F. Supp. 643. The memorandum opinion of the district court granting appellee's motion for a preliminary injunction (App. A, *infra*) is reported at 350 F. Supp. 167.

JURISDICTION

The judgment of the three-judge district court (App. D, *infra*), enjoining the discharge of appellee Ballard, was entered on July 18, 1973. A notice of appeal was filed on August 14, 1973 (App. E, *infra*).

The government's motion for a new trial, filed July 6, 1973 (App. C, *infra*), was denied on August 23, 1973 (App. F, *infra*). A second notice of appeal was filed on September 20, 1973 (App. G, *infra*). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the district court erred in using the "compelling governmental interest" test, rather than the "rational basis" test, in reviewing the constitutionality of military statutes creating differences in personnel administration based on sex.

2. Whether the differences in the Naval attrition statutes relating to men and women lieutenants (10 U.S.C. 6382 and 6401, respectively) are in violation of the Constitution.

STATUTES INVOLVED

10 U.S.C. 6382 provides in relevant part:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

10 U.S.C. 6401 provides in relevant part:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in whicl.—

> (1) she is not on a promotion list; and
> (2) she has completed 13 years of active commissioned service * * *.

STATEMENT

The appellee, Lieutenant Robert C. Ballard, U.S.N., having twice failed of selection for promotion to lieutenant commander, was scheduled for discharge from the Navy no later than June 30, 1972, pursuant to the mandatory requirement of 10 U.S.C. 6382(a). That statute is a typical one requiring thinning of the ranks to retain the best qualified officers and to permit orderly promotion of lower ranking officers.[1]

---

[1] Section 6382(a) appeared as Section 312(h) of the Officer Personnel Act of 1947, 61 Stat. 860, which, in turn, was derived from Section 12(c) of the Act of June 23, 1938, 52 Stat. 949. See H. Rep. No. 2134, 75th Cong., 3d Sess., p. 3; S. Rep. No. 2120, 75th Cong., 3d Sess.; H Conf. Rep. No. 2764, 75th Cong., 3d Sess. "The basic objectives of the * * * [1947 Act] were to provide a better opportunity for a reasonable career to the well qualified officer, to provide for greater equality of promotion opportunities by producing a more positive flow of promotion, to create a practical method to accelerate the promotion of outstanding officers in all grades, and to meet the increased need for specialization in certain fields." Seymour, *Promotion of Officers in the Naval Service*, 1956 JAG Journal 5, 6. See also H. Rep. No. 640, 80th Cong., 1st Sess.; Fink affidavit, p. 5.

The parts of the Officer Personnel Act of 1947 affecting naval officers were codified in 10 U.S.C. 5401, *et seq.* by the Act of Aug. 10, 1956, 70A Stat. 1. Earlier reforms of the naval officer promotion system (which originally was based solely on seniority) were enacted by the Act of July 16, 1862, 12 Stat. 583; Act of Aug. 29, 1916, 39 Stat. 556; Act of Mar. 3, 1931, 46 Stat. 1482; Act of May 29, 1934, 48 Stat. 814; and Act of June 23, 1938, 52 Stat. 944. See Fink affidavit, pp. 2–4.

Although Lt. Ballard's performance of his duties was satisfactory, he was considered to be in the lower 15 percent of eligible lieutenants by two separate selection boards, and was not recommended for promotion. Hence, he became subject to the mandatory discharge requirement of 10 U.S.C. 6382. As an officer discharged under 10 U.S.C. 6382, Lt. Ballard would be entitled to $15,000 severance pay. 10 U.S.C. 6382(c).

On June 16, 1972, Lt. Ballard filed suit in the district court, alleging that 10 U.S.C. 6382 was unconstitutional in requiring his discharge after (in his case) some nine years of commissioned service, whereas 10 U.S.C. 6401(a) required discharge of women Navy lieutenants not on a promotion list only after 13 years of commissioned service.[2]

A three-judge court, convened under 28 U.S.C. 2282,

[2] 10 U.S.C. 6401(a) applies to women line and staff lieutenants on the active list (regulars appointed under 10 U.S.C. 5590). A similar statute applies to men and women lieutenants in the Nurse Corps (appointed under 10 U.S.C. 5580). 10 U.S.C. 6396 (c). Both of these statutes operate if the lieutenant involved is "not on a promotion list" during the fiscal year in which 13 years of service is completed. In other words, they require discharge at that time even if the lieutenant was never considered for promotion (rather than considered and passed over twice). See Fink affidavit, p. 7. Women staff lieutenants of the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579) are subject to the same attrition statute which applies to male lieutenants (10 U.S.C. 6382). Reserve women lieutenants serving on active duty (line, staff, and Nurse Corps) are subject to elimination from active status under conditions similar to those prescribed for separation of regulars in these components. See 10 U.S.C. 6403, 6389, 6397.

granted a preliminary injunction enjoining appellee's discharge pending a final decision.[3] 350 F. Supp. 167 (App. A, *infra*). Following presentation of additional affidavits and other documents, and a hearing, the court concluded that the 13-year selection out provision of 10 U.S.C. 6401 favors women Navy officers and constitutes an invidious discrimination against male Navy officers mandatorily discharged under similar conditions before completing 13 years of service (App. B, *infra,* p. 19a). The court, citing *Frontiero* v. *Richardson,* 411 U.S. 677, held that the "compelling governmental interest" test applied, and that the differences between 10 U.S.C. 6382 and 6401 were not supported by any compelling interest perceptible to it. The court enjoined the government from discharging Ballard "solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service * * *" (App. B, *infra,* p. 20a, App. D, *infra,* p. 23a). 360 F. Supp. 643, 648.

After the court issued its written opinion (on June 26, 1973), and prior to the entry of its judgment (on July 18, 1973), the government on July 6, 1973 filed a motion for a "new trial" (App. C, *infra,* pp. 21a–22a), together with an additional affidavit.[4] This affidavit pointed out that, of a total of 71,689 officers on active duty in the Navy (as of November 1972), 68,456 were men and only 3,233 were women (pp. 2, 13); that all male Navy lieutenants in the Regular Navy (numbering 16,585) would be guaranteed a 13-

[3] A temporary restraining order had previously been entered on June 20, 1972.

[4] Affidavit of Capt. E. R. Fink, JAGC, U.S.N. (July 6, 1973).

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year tenure out if the court's order should be followed and upheld (p. 2);[5] that there are only 167 women lieutenants in the Naval service who could be subject to 10 U.S.C. 6401(a) (p. 2);[6] that the 13-year selection out provision in 10 U.S.C. 6401 for women lieutenants presently had the effect of counteracting other traditional barriers to full participation and promotional opportunity for women officers in the Naval service, including previous size and promotion limitations,[7] and continuing restrictions against service by women on combatant vessels and aircraft, 10 U.S.C. 6015 (pp. 10–12); that if equalization should be absolutely required, a more appropriate form of equalization in terms of overall needs of the service would be to eliminate altogether the 13-year provision and open up more Navy positions to women officers, thus creating more promotional opportunity for women officers, rather than create an across-the-board 13-year selection out provision for all male Navy lieutenants (pp. 8–9, 12); and that, because of fiscal limitations, the immediate effect of the court's order, if followed in related class action litigation, could be to jeopardize the retention (through the end of the present fiscal year) of 630 lieutenants (junior grade) (pp. 11–12).

[5] Some 238 lieutenants were subject to mandatory discharge under 10 U.S.C. 6382 on June 30, 1972. Forbes affidavit, p. 1. Under present Secretarial promotion policy, the effect of this is to open up 238 additional vacancies for promotion of regular lieutenants (junior grade).

[6] Women officers on active duty numbered 3,233 (as of November 1972). Of these, 733 were women line or staff appointees, regular (504) or reserve (229); and 2,500 were women members of the Nurse Corps or other integrated staff corps, regular (702), temporary (1), or reserve (1,797). See Fink affidavit, p. 13.

[7] In 1967 Congress repealed the prior restrictions on overall number of women in the Navy (enlisted and officers), restrictions against promotion to captain, and age limitations, and authorized the promotion of women, in certain circumstances, to flag rank. See Sections 1(14), 1(16), 1(18)(L), 1(19) and 1(24) of the Act of Nov. 8, 1967, 81 Stat. 374; S. Rep. No. 676, 90th Cong., 1st Sess.; Fink affidavit, pp. 8–10.

The court without opinion denied the government's motion for a new trial.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important questions concerning the constitutionality of carefully formulated statutory provisions designed to facilitate the retention and promotion of the best qualified naval officers. As explained in the affidavit supporting the government's motion for a new trial discussed above, the different time periods for retention of male and female officers reflect the practical needs and sound personnel operations of the Navy and rest upon compelling public policy considerations. The relief the district court ordered would have a serious adverse impact upon the Officer Corps of the Navy. Plenary review by this Court of a decision with such serious consequences is necessary.

1. The court below erroneously held that the difference in the retention time for male and female naval officers must be supported by a "compelling governmental interest" sufficient to overcome a "suspect" classification. The issue whether differences in treatment based on sex must be supported by such a compelling interest, or instead by the usual "rational basis" showing, was not resolved by this Court in

Frontiero v. *Richardson*, 411 U.S. 677, involving differences in eligibility for military dependent's allowances. In that case only four Justices adopted the compelling governmental interest test; four other Justices, while concurring in the result, either rejected that test or were of the opinion that the issue should not be reached in that case. At least in matters affecting the organization and military readiness of the armed services, the application of the "suspect" classification standard is inappropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 94.

2. In any event, the differences between 10 U.S.C. 6382 and 6401 are in fact supported by a compelling governmental interest. This interest (which *a fortiori* would constitute a "rational basis" for the difference) is based on a combination of complex factors, both historical and practical. The Navy, like the other military services, traditionally has been a male-dominated service; duty on board combatant vessels and aircraft is still restricted by statute to males, 10 U.S.C. 6015; male officers far outnumber female officers; and a system of orderly and assured promotion or selection out, based solely on fitness, has been considered by Congress to be essential for the maintenance of an efficient and motivated officer command structure.[8]

Competent line and staff officers of every rank are required in the operational units of the Navy (which are largely made up of combatant vessels) and in support, staff and specialized units. However, Congress fixes by statute the total number of personnel—officer and enlisted—in the Navy, and reviews and

[8] See *supra*, n. 1.

approves or disapproves the Navy's proposed ratio of officers to enlisted persons. *E.g., Section* 301, 86 Stat. 735; 86 Stat. 1184; H. Rep. No. 1389, 92d Cong., 2d Sess., p. 48. In addition to reviewing the ratio of officers to enlisted persons, Congress has set by statute the distribution of the total number of unrestricted line officers within the various grades. See 10 U.S.C. 5442. Promotions are based on merit and, in the case of most officers, on vacancies in the next higher grade. 10 U.S.C. 5707, 5756, 5769. Separate promotion systems are established for unrestricted line officers (those eligible to command at sea), restricted line officers (those not eligible to command at sea), and for staff officers (supply, medical corps, etc.). See 10 U.S.C. 5769(b), 5773.

Thus, officers generally compete for promotion against officers of similar experience for the more limited vacancies which exist in the next higher grade. The selection out rule for male lieutenants twice passed over is a necessary part of a system designed to limit the Naval service to the best qualified, and to assure timely promotion of qualified younger officers.[9]

Women line and staff officers are promoted under a separate system because they lack the combatant and sea duty of male officers, and accordingly have not only less competitive advantage, but fewer command positions to which they could be promoted. See Kinnear affidavit, pp. 2–4. Moreover, promotion of women lieutenants (junior grade) is not dependent on vacan-

[9] See Kinnear affidavit, pp. 1–3; Connally affidavit, p. 1; Fink affidavit, pp. 4–6.

cies in the women lieutenant grade. Connally affidavit, pp. 2–3; 10 U.S.C. 5760. Since 1967 and within the women's promotion system, the Secretary of the Navy has initiated, as a matter of personnel policy, a program to accelerate the promotions for women. Today, because of Secretarial policy, women are considered for promotion within the same time periods as men.

During normal peace-time conditions it is expected that a male lieutenant would complete about 13 years of commissioned service before he was passed over twice.[10] But Congress has permitted an acceleration of promotions (temporary promotions) for male officers to meet the rising need for officers during wartime conditions, as in the case of the recent conflict in Southeast Asia.[11] That conflict, and prior periods of international tension, have had the effect of reducing the promotion time for lieutenants, and the selection out time for those passed over twice, to eight or nine years.[12] In the post-war period the opposite trend may be expected, when the oversupply of officers created by the war is reduced. In these circumstances the

[10] See Section 308(a)(13) of the Officer Personnel Act of 1947, 61 Stat. 846; now 10 U.S.C. 5768(a) (12 year normal total commissioned service for male line lieutenants). Those lieutenants considered for promotion to lieutenant commander for the *second* time would attain 13 years of commissioned service. See Fink affidavit, p. 6; Connally affidavit, pp. 1–2.

[11] 10 U.S.C. 5751(b) fixes minimum service-in-grade requirements for consideration for promotion. It was suspended by the President in 1968 under the authority of 10 U.S.C. 5785(b). See Executive Order No. 11437 (Dec. 2, 1968), 33 Fed. Reg. 17945.

[12] Connally affidavit, p. 2.

selection out statutes applicable to male officers continue to serve a necessary purpose. A 13-year selection out period for twice passed over male lieutenants would be detrimental to the needs of the service, and would be inconsistent with maintenance of a highly qualified and competitive Naval officer corps."[13]

Women lieutenants are presently subject to the same 13-year tenure originally enacted in 1948 as the practical equivalent then to the peace-time selection out time for male lieutenants twice passed over.[14] Congress may decide to amend this provision to conform to the selection out rules applicable to male lieutenants.[15] However, Congress has not yet done so, presumably because the retention for 13 years of women lieutenants (who have been passed over twice or otherwise have not been promoted) has not been considered inconsistent with the needs of the Naval service.[16] The lack of equivalent promotional opportunity for women,

[13] The number of promotion opportunities for the grade of lieutenant would be lessened if twice-passed-over lieutenants were allowed to continue serving in that grade, in view of the long-standing policy of the Secretary of the Navy that promotion of lieutenants (junior grade) depends on vacancies by attrition or promotion in lieutenant ranks.

[14] 10 U.S.C. 6401, originally enacted as Section 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368, was so explained in Hearings Before the Senate Armed Services Committee on S. 1103, S. 1527, and S. 1641, 80th Cong., 1st Sess., p. 39. See also Fink affidavit, pp. 7–8, 9.

[15] A draft bill presently being considered by the armed services would substitute for Section 6401 the same provisions which govern male Navy lieutenants (Section 6382). See Fink affidavit, pp. 9–10.

[16] The 1967 Act relating to women members of the armed forces (*supra*, n. 7) made no changes to Section 6401. S. Rep. No. 67, 90th Cong., 1st Sess., p. 13.

and the relatively small number of women line officers in the service, would explain this, if explanation is necessary. See *Frontiero* v. *Richardson*, 411 U.S. 677, 689, n. 22.[17]

This conclusion is strengthened by an examination of the basis of the decision in *Frontiero, supra*. The plurality opinion of Mr. Justice Brennan observed that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." 411 U.S. at 686–687. The statute in issue here has had no such effect. While providing additional tenure protection for female officers, it has not relegated male officers to an "inferior legal status."

The effect of the judgment in this case is to give males a benefit not intended by Congress, under the guise of a remedy for unconstitutional discrimination. Ironically, the statutory provision being used to achieve this result is one that, unlike the examples discussed in *Frontiero*, has the effect of advancing the status of women, in compensation for their traditional disadvantages in military careers.

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[17] Moreover, a 13-year tenure for women lieutenants does not jeopardize promotion of women lieutenants (junior grade), since all women lieutenants (junior grade) are eligible for promotion to lieutenant, regardless of the number of lieutenants. 10 U.S.C. 5760; Connally affidavit, pp. 2–3.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
ROBERT E. KOPP,
MICHAEL KIMMEL,
Attorneys.

NOVEMBER 1973.

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APPENDIX A

[Filed October 25, 1972, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civ. No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

vs.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Memorandum

Before CARTER, Circuit Judge, and EAST and SCHWARTZ, District Judges[1]

EAST, *Senior District Judge:* This three-judge District Court heard counsel for the parties on September 12, 1972, upon the Defendants' Motion to Dissolve

[1] Honorable James M. Carter, Senior United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, Edward J. Schwartz, Chief Judge, United States District Court for the Southern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated July 24, 1972.

Three-Judge District Court and the Plaintiff's Motion for a Permanent Injunction and Declaration of Unconstitutionality.

We ordered the Temporary Restraining Order entered herein on June 20, 1972, ordering "that pending a final decision * * *, plaintiff will not be discharged from the Armed Services of the United States," be continued and took the cause as submitted.

Defendants' Motion

On July 24, 1972, Chief Judge Edward J. Schwartz certified to Chief Judge Richard H. Chambers, of the Court of Appeals for the Ninth Circuit, that the complaint herein raised issues under the Equal Protection Clause and Fifth Amendment of the United States Constitution and sought injunctive relief and, further, "that in [his] opinion, the challenge addressed to the act of Congress (Title 10 U.S.C. Sec. 6382) requires the formation of a District Court of three judges composed as required in (Title 28 U.S.C. Sec. 2284)." We subscribe to the certificate of Chief Judge Schwartz, and also take cognizance that acts of Congress and regulations thereunder providing for demotion in grade or dismissal from service for cause, i.e., incompetency, disobedience, etc., as all other measures for the forfeiture of entitlements, must provide for a reasonable measure of due process notice and hearing. *Goldberg* v. *Kelly*, 397 U.S. 254 and *Bell* v. *Burson*, 402 U.S. 535, 539.

Therefore, we conclude that the challenged Section 6382 is subject to judicial scrutiny for Equal Protection and Due Process Clauses defects and deficiencies. *Korematsu* v. *U.S.*, 323 U.S. 214, 216 (1944), and *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

This Court's jurisdiction is noted under Title 28 U.S.C. Secs. 2201 and 2202, (Declaratory Judgment); Sec. 1331 (Equity Jurisdiction); and Secs. 2282 and 2284 (Restraining the Enforcement of Acts of Congress—Three-Judge District Court). Accordingly, the defendants' motion is denied. *Frontiero* v. *Laird*, 327 F. Supp. 580 (M.D. Ala., 1971); and *Keyishian* v. *Board of Regents*, 345 F. 2d 236 (2d Cir., 1965.)

Plaintiff's Motion

Counsel urged that the cause was ripe for submission on the merits; however, for the reasons later stated, we consider it appropriate and expedient to deal with plaintiff's motion as one for a preliminary injunction under Secs. 2282 and 2284(3), supra, and Rule 65 F.R. Civ. P.

We point out that the defendants have not appeared herein, except through their motions herein, and we have only a record comprised of plaintiff's complaint, its exhibits, affidavits on behalf of the plaintiff and, on behalf of the defendants, the affidavit of Rear Admiral B. B. Forbes, Jr. and a signed affidavit of one Robert F. Connally, filed September 13, 1972.

For the purpose of this memorandum, we accept the allegations and averments before us as true and find that plaintiff:

1. Is a Lieutenant in the U.S. Navy and has been a commissioned officer since August 16, 1962, for a total of more than nine years continuous active commissioned service. Prior to commission, he served seven years as an enlisted man.

2. Has served with distinction in the U.S. Navy and with overall outstanding fitness reports. In all of his fitness reports he has been recommended for promotion.

3. Was scheduled to be discharged and would have been, but for the restraining order, on June 30th last, from the naval service for the sole reason that plain-

tiff had not been promoted to Lt. Commander during the nine years and ten and one-half months that plaintiff has been in active commissioned service as required by Sec. 6382, supra.[2]

4. If discharged as of June 30th, last, will receive severance pay of approximately $15,000, as opposed to approximately $200,000 of benefits which would accrue to him if allowed to serve in commissioned status at least thirteen years.

ACTS OF CONGRESS INVOLVED

Title 10, U.S.C. Sec. 6382(a) provides, inter alia:

> Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the nurse corps, * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time. However, if he so requests he may be honorably discharged at any time during that fiscal year.

Title 10, U.S.C. Sec. 6401(a) provides, inter alia:

> Each woman officer on the active list of the Navy, appointed under Sec. 5590 of this Title, who holds a permanent appointment in the grade of lieutenant, * * * shall be honorably discharged on June 30 of the fiscal year in which she is not on a promotion list; and too, she has completed 13 years of active service in the Navy * * *. However, if she so requests, she may be honorably discharged at any time during that fiscal year.

[2] Communication of the Department of the Navy, Chief of Naval Personnel, to Plaintiff dated 17 March 1972, stating inter alia: "(Sec. 6382, supra) requires that officers of your category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation * * *" (Complaint Exh. "A").

DISCUSSION

The defendants urge that under this factual picture, the plaintiff is seeking judicial relief from purely executive or command policy or function dictating his non-continuance in commissioned naval service. True it is that courts have held that "Armies cannot be maintained and commanded, and wars cannot be won by the judicial process. Supervision and control over the selection * * * and dismissal of officers are not judicial functions." *Beard* v. *Stahr*, 200 F. Supp. 760 (Dis. Col., 1961) and *Struck* v. *Secretary of Defense*, F. 2d (9th Cir., Nov. 15, 1971) Pet. for Cert. filed, and their followers.

However, here we are faced with the claim, not faced by the Court in *Beard* and *Struck*, supra, that the enforcement of Sec. 6382 and any regulations adopted thereunder against the plaintiff constitutes an invidious discrimination between sexes[3] in naval service and violates his United States Constitutional guarantees, namely, the Equal Protection and Due Process Clauses. *Beard* and *Struck*, supra, are accordingly distinguishable and not authority on our constitutional issues. We presently are inclined to the view that executive or command decision has nothing

[3] We do not intend to elaborate upon the current naval command policy of placing women officers in command positions in parity with men so far as practicable, except to comment an all out effort is being made to reach that goal. (See news releases on record for our information)

whatever to do with the proposed discharge of plaintiff on June 30th, last. On the contrary, the discharge is mandatory through the operation of the unqualified legislative edict of Sec. 6382. This is established by the affidavit of Rear Admiral B. B. Forbes, Jr., U.S.N., attached to defendants' brief. The Admiral states: "Two hundred and thirty-eight male lieutenants of the Regular Navy were subject to the *mandatory discharge* from the Navy on June 30, 1972, pursuant to the provisions of Sec. 6382 * * *. Thirty-one of these officers have served more than 18 years active duty on June 30, 1972 and, after discharge, they were granted commissions as active-duty officers in the United States Naval Reserve. This was done pursuant to a long-established policy within the Navy." [Emphasis supplied.]

It is manifest that the only command function or policy exercised over the 238 male lieutenants was applicable to the 31 who received the active duty Reserve status, while the remaining 207 male lieutenants were discharged pursuant to the legislative edict.

The recurring imbalance of demand and supply of active duty officers for the various grades taxes the rational exercise of command policy and decision. Sometimes this imbalance results in an acceleration and at other times in a slowing down of the command set time interval between promotions of officers. Yet, Sec. 6382, enacted in 1947, obviously a post Second World War legislative weeding edict, operates on the turn of the calendar.

The act on its face appears to be a valid legislative enactment; however, the Supreme Court has often held that a valid statute was unconstitutionally applied to the circumstances of an individual. The rationale of *Broddie* v. *Connecticut,* 401 U.S. 371 (1971)

is applicable with its full force in this cause. There the fee payment requirement of a statute operated unequally against the indigent. Here the statute operates unequally against a male officer when compared to a comparable statute operating favorably to the female officer.

There is an ever-increasing weight of sound judicial authority recognizing that laws, regulations and entitlement pre-requisites and forfeitures resulting in a more favorable treatment to a class of one sex, as opposed to the other, results in unconstitutional discrimination and unequal protection of the laws. *Diaz* v. *Pan American Western Airway,* 442 F. 2d 385 (5th Cir. 1971) *cert. denied* 404 U.S. 950. The Supreme Court has spoken directly against sex discrimination in legislative acts. *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942).

Grave constitutional questions and issues arising under the Equal Protection Clause, as well as probably the Due Process Clause, are presented herein. We are not inclined to finally deal with them hastily, and particularly without any showing of executive or command interest or necessity for the apparent discriminatory treatment of plaintiff when compared to the guaranteed 13 years of service to female officers in the same category of non-promoted officers.

We conclude that: (a) The plaintiff, if he is unlawfully discharged as of June 30th, last, will suffer great monetary loss without recourse and irreparable injury by being precipitantly discharged from his career as a naval officer without an opportunity to fully contest the constitutionality thereof; (b) if plaintiff's discharge is enjoined pending final determination herein, the Government will sustain no substantial loss, if indeed any, by reason of recoupment against sever-

ance pay; (c) the equities herein are with the plaintiff; and (d) there is a probability that plaintiff will prevail and the status quo should be maintained.

Accordingly, a preliminary injunction shall issue herein restraining and enjoining the defendants from discharging the plaintiff from commissioned naval service pursuant to the provisions of Sec. 6382, until final determination and further order herein.

This memorandum shall stand as the Court's findings of fact and conclusions of law as provided for by Rule 52(a) F.R. Civ. P.

Counsel for the plaintiff is requested to prepare, serve and present herein appropriate order within 15 days from the date hereof.

The defendants are requested to file herein within 30 days from the date hereof, such Answer and further showing to the issues of plaintiff's complaint as they shall deem appropriate, else be in default herein. The plaintiff shall have 15 days from the date of service to make reply.

The Honorable Edward J. Schwartz, Chief Judge of this District Court, is delegated to conduct all appropriate pre-trial proceedings, and the cause is set for final hearing on January 9, 1973, at 2 o'clock p.m., or as soon thereafter as counsel may be heard.

Dated this 25th day of October 1972.

James M. Carter
JAMES M. CARTER,
Senior U.S. Circuit Judge.

William G. East
WILLIAM G. EAST,
Senior U.S. District Judge.

Edward J. Schwartz
EDWARD J. SCHWARTZ,
Chief Judge.

APPENDIX B

[Filed June 26, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72–218–S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER, FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Opinion

Before CARTER, Circuit Judge, EAST and SCHWARTZ, District Judges [1]

EAST, *Senior District Judge:*

STATEMENT OF CASE

FACTUAL SITUATION

It appears from the complaint herein that:

[1] Honorable James M. Carter, Senior United States Circuit Judge for the Ninth Circuit, William G. East, Senior United States District Judge for the District of Oregon, Edward J. Schwartz, Chief Judge, United States District Court for the Southern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated July 24.

The plaintiff, Lt. Robert C. Ballard, U.S.N. (Ballard) as of June 16, 1972, has been in continuous active commissioned service (service) in the United States Navy (USN) since August 16, 1962, and had attained the commission grade of lieutenant, USN. Prior to commissioning, Ballard had served in the USN as an enlisted man for seven years.

Notwithstanding a continuing meritorious service on his part, and pursuant only to command function regulation and custom, Ballard had not been promoted to the grade of lieutenant commander and had twice been passed over for such promotion.

The parties concede that on or about March 17, 1972, the Chief of Naval Personnel, USN, acting for himself and all the defendants in their respective capacities, respectively, advised Ballard that the provisions of 10 U.S.C. 6382 required that he, and other "officers of [his] category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation * * *."

STATUTES

The pertinent statutes involved in this cause are 10 U.S.C. 6382:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps, * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

and 10 U.S.C. 6401:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which——
>
> (1) she is not on a promotion list; and
>
> (2) she has completed 13 years of active commissioned service in the Navy. * * *"

BALLARD'S CONTENTIONS

Ballard filed his complaint herein on June 16, 1972, wherein he contended, inter alia, that:

(a) If discharged on June 30th next pursuant to the provisions of Section 6382 he would be caused very substantial monetary damage through the loss of retirement benefits to which he would be entitled on or about January 1, 1975, and further, that he would suffer irreparable damage to his Naval career through the unequal treatment and protection of the laws of the United States;

(b) Section 6401 grants female officers a minimum tenure term of 13 years commissioned service before mandatory discharge thereunder and Section 6382 grants male officers in like grade and situation no tenure;

(c) He is being discharged pursuant to Section 6382 without the benefit of 13 years service, accordingly, the section "discriminates against him because of his sex when compared to * * * Section 6401 which applies to women [in like grade and situation] and that this deprives [him] of a benefit solely because of his sex," all violative of the equal treatment and protection clause of the Fourteenth Amendment to the United States Constitution; and

(d) Further, he is being otherwise denied his constitutional rights under the due process clause of the Fifth Amendment to the United States Constitution.

RELIEF

Ballard sought temporary restraining order and permanent declaratory and injunctive relief from the threatened discharge, and on June 20, 1972, the Honorable Edward J. Schwartz, District Judge of this District, issued herein the requested temporary restraining order. Thereafter, this three-judge District Court was convened and upon hearing the parties, denied several motions of the defendant and continued the temporary restraining order in effect. On October 25, 1972, this three-judge court entered its Memorandum, Ballard v. Laird, et al., 350 F. Supp. 167, directing the issuance of a preliminary injunction enjoining the discharge of Ballard pursuant to Section 6382 until final determination and set a date certain for final hearing of the cause on its merits.

On March 8, 1973, we heard the parties on motions putting the cause to us on its merits, received into evidence further written agreement of facts, documents and affidavits offered by the parties and took the cause under submission.

FINDINGS OF FACT

This court made findings of fact upon the evidence then submitted and stated reasons for its conclusions in the Memorandum. Those reasons are again made and stated herein by reference and findings of fact of the Memorandum repeated as follows:

We find that plaintiff:

1. Is a Lieutenant in the U.S. Navy and has been a commissioned officer since August 16, 1962, for a total of more than nine years continuous active commissioned service. Prior to commission, he served seven years as an enlisted man.

2. Has served with distinction in the U.S. Navy and with overall outstanding fitness reports. In all of his fitness reports he has been recommended for promotion.

3. Was scheduled to be discharged and would have been, but for the restraining order, on June 30th last, from the naval service for the sole reason that plaintiff had not been promoted to Lt. Commander during the nine years and ten and one-half months that plaintiff has been in active commissioned service as required by Sec. 6382, supra.

4. If discharged as of June 30th, last, will receive severance pay of approximately $15,000, as opposed to approximately $200,000 of benefits which would accrue to him if allowed to serve in commissioned status at least thirteen years.

In addition, we find that:

As of March 8, 1973, Ballard had increased his continuous commissioned service to a total of 10 calendar years, 6 calendar months and 22 days, and that the service of Ballard utilized under the restraining orders had been of high merit and much value to the USN;

The threatened USN order of discharge, under restraint, as aforesaid, continues to be implemented and based solely upon the mandatory discharge provisions of Section 6382; and

No woman USN officer has been heretofore discharged from commissioned service pursuant to the provisions of Section 6382.

DISCUSSION

We reach Ballard's claims of unequal and discriminatory treatment arising from the enforcement

of the mandatory discharge requirements of Section 6382 under the due process clause of the Fifth Amendment to the United States Constitution.

> [W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe,* 347 U.S. 497, 499." *Schneider* v. *Rusk,* 377 U.S. 163 (1964), at 168, (favoring native born over naturalized citizens).

Bolling tells us that "[w]e have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools." "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." at 499. So, "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government," at 500, under the due process clause.

There is no evidence before us nor is it contended by the defendants that "having failed of selection for promotion" or "is not on a promotion list" is necessarily related to quality of service on the part of the officer, male or female, nor do the mandatory discharge provisions respectively involve in any manner the exercise of USN command function or policy governing the promotion and discharge, for cause, of any USN commissioned officer. Accordingly, as noted in the Memorandum, such authorities as *Beard* v. *Stahr,* 200 F. Supp. 766 (D. C. 1961), and *Struck* v. *Secretary,* 460 F. 2d 1372 (9th Cir. 1972), *cert. granted and remanded,* 409 U.S. 947, 1071 (1972), are distinguishable and of no concern to us.

The mandatory discharge provisions of each of the sections are pure and simple legislative dictates and commands of an administrative or fiscal character and policy. In the Memorandum we spoke of the imbalance of supply and demand of commissioned officers caused by the rise and ebb of national emergencies and of the taxing of command decision and function in the acceleration and deferring of the time intervals of promotion caused thereby.

It is the result of this imbalance that placed Ballard in the grade of lieutenant prior to the time lapse of the norm of prescribed promotion intervals and kept him in that grade for the two passovers. Thus was created the surplus of some 238 USN lieutenants who were subject to Section 6382 discharge on June 30, 1972, all for the lack of vacancies in the grade of lieutenant commander.

We deem the mandatory discharge provisions of Section 6382 to be legislative fiscal outlay saving devices for the weeding out of a surplus of USN officers in a given grade before the vesting of retirement benefits. We acknowledge that no constitutional quarrel can be made over such a legislative policy per se. Yet, the Memorandum anticipated and we now see a constitutional ban against the built-in invidious discriminatory application of the legislative mandatory discharge provisions of the statutes which favor the members of one sex over the other.

Congress gave the judiciary the vehicle of the civil rights act to facilitate the destruction of sex discriminatory practice in private business. *Diaz* v. *Pan American Western Airway,* 442 F. 2d 385 (5th Cir. 1971), *cert. denied,* 404 U.S. 950 (female preference in employment); *Rosen* v. *Public Service Electric and Gas Co.,* 3rd Circuit, slip opinion March 8, 1973 (female preference in retirement plan); *Eslinger* v. *Thomas,*

4th Circuit, slip opinion March 28, 1973 (male preference in appointment of state senate pages).

Here we are sought to utilize and implement the self-executing due process clause to destroy the governmental sex discriminatory practice sponsored by the two statutes.

In *Reed* v. *Reed,* 404 U.S. 71 (1971), the court had under challenge of equal protection clause infringement a state statute giving mandatory preference to male over female applicants, without regard to their individual qualification (sole basis of sex), for appointment as administrator of decedent's estates. In short, the court thought the statute provided "dissimilar treatment for men and women who are . . . similarly situated," at 77, and "thus establishes a classification subject to scrutiny under the equal protection clause," at 75. The court held that state's interest (reducing the work load on probate courts) "is not without some legitimacy," but is "inconsistent with the command of the equal protection clause." "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment," at 76.

As were the discriminatory business and state practices involved in those cases, so is the challenged government's practice under the two sections under challenge here. The plain reading of the two sections when applied gives the female officers a guaranteed tenure term of 13 years commissioned service, except, of course, for a discharge for cause, and male officers, similarly situated, no such guaranteed tenure of service within which time to achieve the required grade and forestall the mandatory discharge.

Controlling our decision now is *Frontiero* v. *Secretary,* United States Supreme Court, slip opinion May 14, 1973, 41 LW 4609.

Mrs. Frontiero was a member of the uniformed services. In order to obtain "dependent" increased quarters allowance and medical expense benefits allowable under a set of statutes she was required to show in fact that her husband was dependent upon her for over one-half of his support. Under those statutes a male in the service could claim his wife as a "dependent" whether or not she was in fact dependent upon him for any part of her support. She claimed due process clause infringement arising from the required application and actual support showing procedures.

The court in *Frontiero* located the fount of its rationale in the teachings of *Reed,* supra, and quickly concluded that

> classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny,

under the due process clause of the Fifth Amendment.

We paraphrase Frontiero's main claim of lack of due process under the law to fit Ballard's claim of discriminatory treatment, i.e., Frontiero "asserted that the discriminatory impact of the statues is twofold: First * * * [demonstration of dependency]; and second, as a substantive matter, a [female] member [is granted tenure in service] while a similarly situated [male] member is denied such benefits."

Whether the discriminatory impact results in favoring the female rather than the male is no logical differential in the utilization of the teachings of *Frontiero. Diaz,* supra, and *Rosen,* supra, each found no handicap in striking down female favoritism under

the civil rights act—a legislative implement of the equal protection clause, nor do we here in a judicial implementation of the equal protection clause.

Nor do we see any logical reason for a different consideration and treatment because the asserted discriminatory impact and result arises from the combined wording and application of two separate statutes rather than from the wording and application of an interlocking set or single statute.[2]

The court in *Frontiero* had no difficulty in placing women on an equal footing with men in military service benefits. The USN goes further, as it is common knowledge that a women with the grade of captain has been detailed to line command. News releases of USN command policy in evidence dispels any concept of inability between the sexes, per se, to serve in command detail. See note 2 in the Memorandum.

The defendants here attempt to justify the apparent discriminatory impact and force of the statutes through an asserted rational basis for the tenure granted females. There is no evidence of any facts supporting such a rational basis, moreover such a test is improperly asserted. For here, we are faced with an "inherently suspect" classification, and such classifications "are unconstitutional unless the State can demonstrate that such laws are *'necessary* to promote a *compelling* governmental interest.'" *Dunn* v. *Blumstein,* 405 U.S. 330 at 342 (1972); *Frontiero, supra,* and *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

As noted above, the mandatory discharge provisions of each of the sections are in the furtherance of gov-

[2] It has been suggested that the 13 year tenure of commission service offered to women under Section 6401 was a recruiting measure. If so, the invidious discriminatory impact is compounded.

ernmental administrative or fiscal policy, but just what governmental administrative, fiscal interest or savings are served by granting female officers 13 years tenure in service and male officers none is not shown. We assume, without deciding, that some does exist, nevertheless, *Reed* and *Frontiero,* each, held that government "interest of some legitimacy" does not survive a judicial scrutiny and detection of an invidious discriminatory practice. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), holds that the alleviation of fiscal expense is not such a compelling state interest to justify infringement of due process, nor is such fiscal concern such a compelling state interest as to justify infringement of equal protection rights, *Shapiro,* supra. We see no logical reason why the government's interests should not be measured by the same yardstick.

CONCLUSIONS OF LAW

We apply the full thrust of the rationale of *Frontiero* and conclude that:

(a) The legislative guaranteed tenure time of commissioned service granted to women under Section 6401 is an inherently suspect classification;

(b) The effect of the tenure provision of Section 6401 in favor of the female USN officers is an invidious discriminatory practice against male USN officers who are mandatorily discharged under similar conditions before 13 years of commissioned service;

(c) The statutory scheme effectuating that discriminatory practice is constitutionally invalid under the due process clause insofar as the same authorizes and directs the mandatory discharge of male USN officers prior to the expiration of 13 years of commissioned service; and

(d) The defendants, and their successors in their respective official capacities, should be:

(1) permanently enjoined and restrained from mandatorily discharging Ballard solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service, and

(2) Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled to under law as of the close of June 29, 1972, had he not been considered subject to discharge short of 13 years of continuous USN commissioned service.

This opinion shall constitute this three-judge court's findings of fact and conclusions of law as provided for in Rule 52(a) FRCivP.

Counsel for Ballard is requested to prepare appropriate orders hereunder and to submit the same to counsel for the defendants for approval as to form. In the event counsel for the parties cannot stipulate as to the form of the orders, counsel for Ballard shall submit proposed orders to this court before the expiration of 20 days from the date hereof for hearing and settlement.

Dated this 26th day of June, 1973.

JAMES M. CARTER,
United States Circuit Judge.
WILLIAM G. EAST,
United States District Judge.
EDWARD J. SCHWARTZ,
United States District Judge.

APPENDIX C

[Filed July 6, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

(Defendants' Motion for New Trial Pursuant to Rule 59(b) F.R. Civ. P. or in the Alternative To Amend Finding Pursuant to Rule 52(b) F.R. Civ. P.)

COME NOW defendants by and through their attorneys Harry D. Steward, United States Attorney and Frederick B. Holoboff, Assistant United States Attorney, Southern District of California and move for a new trial pursuant to Rule 59(b) F.R. Civ. P. or in the alternative to amend finding pursuant to Rule 52(b) F.R. Civ. P. upon the following grounds and for the following reasons. This motion is supported by a telephoto of an affidavit or further showing of the U.S. Navy attached hereto which will be replaced when this office receives the actual documents from Washington, D.C.

On page 6 of this Court's written opinion beginning at line 12, this Court stated:

> There is no evidence before us nor is it contended by the defendants that 'having failed of selection for promotion' or 'is not on a promotion list' is necessarily related to quality of service on the part of the officer, male or female, nor do the mandatory discharge provisions respectively involve in any manner the exercise of USN command function or policy governing the promotion and discharge, for cause, of any USN commissioned officer. Accordingly, as noted in the Memorandum, such authorities as *Beard* v. *Stahr*, 200 F. Supp. 766 (D.C. 1961), and *Struck* v. *Secretary*, 460 F. 2d 1372 (9th Cir. 1972), *cert. granted and remanded*, 409 U.S. 947, 1071 (1972), the distinguishable and of no concern to us."

The attachments hereto, in addition to contradicting the aforesaid finding, show that defendants are entitled to the relief requested herein. These attachments or other attachments will be filed as appropriate.

WHEREFORE, defendants respectfully urge that this Court permit a new trial pursuant to Rule 59(b) F.R. Civ. P. or in the alternative amend the finding on page 6 of this Court's opinion pursuant to Rule 52(b) F.R. Civ. P.

Dated: July 6, 1973.

HARRY D. STEWARD,
United States Attorney.
ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.
FREDERICK B. HOLOBOFF,
Frederick B. Holoboff,
Assistant U.S. Attorney,
Attorneys for Defendants.

APPENDIX D

[Entered July 18, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72–218–S

LT. ROBERT C. BALLARD, USN, PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; ET AL., DEFENDANTS

Order and Judgment

IT IS HEREBY ORDERED AND ADJUDGED in conformity with this Court's written Opinion of June 26, 1973, Civil No. 72–218–S, that defendants, and their successors in their respective official capacities, are:

1. permanently enjoined and restrained from mandatorily discharging plaintiff Ballard solely because of passovers in grade as provided for in § 6382 prior to the expiration of thirteen years of commissioned service, and

2. Plaintiff Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled to under law as of the close of June 29, 1972, had he not been con-

sidered subject to discharge short of thirteen years of continuous USN commissioned service.

Dated: July 16, 1973.

JAMES M. CARTER,
United States Circuit Judge.
WILLIAM E. EAST,
United States District Judge.
EDWARD J. SCHWARTZ,
United States District Judge.

Approved as to form:
FREDERICK B. HOLOBOFF,
Assistant United States Attorney.

APPENDIX E

[Filed August 14, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, USN, PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER, FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Notice of Appeal

Defendants, MELVIN LAIRD, Secretary of Defense, JOHN CHAFEE, Secretary of the Navy, VICE ADMIRAL DAVID BAGLEY, U.S.N., Chief of Naval Personnel, and CAPTAIN ROBERT H. LEMMON, U.S.N., Commander, Fleet Training Group, San Diego, California, hereby appeal to the United States Supreme Court from the

order and judgment of the three-judge District Court entered on July 18, 1973.

Dated this 14th day of August, 1973.

Respectfully submitted,

HARRY D. STEWARD,
United States Attorney.
ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.
FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney,
Attorneys for Defendants.

APPENDIX F

[Filed August 23, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72-218-S

LT. ROBERT C. BALLARD, U.S. NAVY, PLAINTIFF

v.

MELVIN LAIRD, ETC., ET AL., DEFENDANTS

(Order denying motion for new trial and to amend findings of fact and conclusions of law)

Upon consideration of plaintiff's [defendants'] motion for a new trial and to amend the findings of fact and conclusions of law heretofore made and entered herein, and upon consideration of defendants' plaintiff's response, and the court being fully advised in the premises, and being of the opinion that said motion should be denied:

IT IS THEREFORE ORDERED that the plaintiff's [defendants'] motion for a new trial and to amend the findings of fact and conclusions of law be, and the same hereby is, denied.

Dated: August 23, 1973.

James M. Carter,
JAMES M. CARTER,
U.S. Circuit Judge.
William G. East,
WILLIAM G. EAST,
U.S. District Judge.
Edward J. Schwartz,
EDWARD J. SCHWARTZ,
U.S. District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973

APPENDIX G

[Filed September 20, 1973, Clerk, U.S. District Court, Southern District of California]

United States District Court, Southern District of California

Civil No. 72–218–S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIFORNIA, DEFENDANTS

Notice of Appeal

Defendants hereby appeal to the United States Supreme Court from the order and judgment of the three judge District Court entered on July 18, 1973, from the order denying their motion, and not plaintiff's, for new trial and to amend findings of fact and conclusions of law dated, filed and entered on August 23, 1973.

Dated this 19th day of September, 1973.

HARRY D. STEWARD,
U.S. Attorney.

ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division.

FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney.
Attorneys for Defendants.

In the Supreme Court of the United States

OCTOBER TERM, 1973
No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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DOCKET ENTRIES

No. 72-218-S in the United States District Court for the Southern District of California

BALLARD vs LAIRD

6-16-72	Fld compl for Declaratory Judgment, Injunctive relief & for Temp Restraining ord and appl for a three Judge Court.
	MADE JS-5 CARD-1SSD SUMMONS TO Mars.
	Fld affid in support of appl for temp restraining ord & prelim injunction and P&A's in support.
6-20-72	Fld temporary restraining order that pending a final decision in the above case, pltf will not be discharged from the armed services. (S)
6-22-72	IT IS ORDERED Pltf's mot for temp restraining order and prelim injunction is placed on Thursday, June 29, 1972 at 9 a.m. (S)
6-26-72	Fld affid and argument in support of extension of temp restraining order.
6-28-72	Fld Deft's opposition to extension of temporary restraining order.
6-29-72	Fld Pltf's response to opposition to extension of temporary restraining order pending a hrng on the merits.
6-29-72	HRNG MOTS: Ent ord hrng appl for Temp Restraining Ord—Order TRO cont & cause cont to 7/17/72 at 2 p.m., hrng on question of 3 Judge Panel. (S)
7-13-72	Fld Pltf's P&A's and argument in support of appl for three judge court and for injunctive relief.
	Fld affidavit in support of application for three Judge Court.
7-13-72	Fld deft's memo of P&A's in opposition to convening a three-judge dist court, with exhs attached.
7-17-72	HRNG MOTS—Ent ord mot for 3 judge panel is granted and TRO shall cont to that date. Order defts motion to dismiss denied. (S)
7-24-72	Fld notification and certificate and mailed copies. (S)
8-8-72	Fld notice of pre-trial conf in crtrm #2 on 8-28-72 at 2 p.m. Counsel notified.

8-8-72 Fld notice of hrng before a three-judge court consisting of Judge Carter, Judge Schwartz and Judge East in crtrm #2 on 9-12-72 at 2 p.m. Counsel notified.

8-28-72 HRNG MOTS—Ent ord cause cont to 9-5-72 at 2 p.m. for Pre-TRIAL hrng. (8)

9-5-72 P/T hrng; Ent ord stip; & Ord to be submitted; Cause cont to 9-12-72 at 2 p.m. for 3 judge hrng. (8)

9-11-72 Fld statement of facts.

9-12-72 Fld affid of Lt Robert C. Ballard.

9-12-72 Fld Pltf's Brief.

9-12-72 Fld Deft's mot to dissolve three-judge District Court.

9-12-72 HRNG before a three-judge court concerning the constitutionality of 10 USC 6382 and 10 USC 6401; Judges James M. Carter; Edward J. Schwartz and William G. East; IT IS ORDERED cause shall stand submitted and TRO shall cont in effect until decision is filed and if the decision is adverse the Court will consider a motion for continuance of TRO pending appeal. (C) (8) (East)

9-13-72 Fld affidavit of Robert F. Connally.

10-11-72 Fld affid in support of judgmen for Pltf Ballard.

10-25-72 Fld memo of three Judge court that a prelim injunction shall issue restraining defts from discharging the pltf from commissioned naval service, until final determination and fur ord; This memo shall stand as Court's findings of fact & conclusions of law; Counsel for pltf is requested to prepare serve and present herein appropriate ord within 15 days from date hereof; Defts are requested to file herein within 30 days from date hereof, such answer and fur issues of pltf's compit as they shall deem appropriate, else be in default. The pltf shall have 15 days from the date of service to reply; Judge Schwartz is delegated to conduct all appropriate P/T proceedings, and the final hrng is set for 1-9-72 at 2 p.m. (8) (Carter) (East) Copies mailed.

11-22-72 Fld stipulation re continuance that defts may have to & including 12-1-72 to answer, with ord thereon. (8)

12-1 -72 Fld Deft's ANSWER; T/W; memo of law & fur showing.

12-6 -72 IT IS ORDERED on the Court's own motion, the trial in the above entitled case is hereby continued from January 9, 1973, to February 20, 1973 at 9:30 a.m. (8) Notices mailed by certified mail

12-21-72 Fld pltf's reply to deft's answer.

12-22-72 Ent ord on the court's own mot, the trial in the above entitled cause is hereby cont from 2-20-73 to 2-22-73 at 9:30 a.m. (8)

2-7 -73 Fld notice of mot and mot to dissolve three-judge dist court; vacate prelim injunction and dismiss the compit herein. NOTICED FOR 2-22-73 at 9:30 a.m.

2-13-73 IT IS ORDERED on the Court's own mot, the trial in the above case is cont from 2-22-73 to 3-8-73 at 9:30 a.m. (8) Copies mailed.

3-8 -73 Fld agreed statement of facts

3-8 -73 Fld Pltf's supplemental Brief

3-8 -73 Final Hearing before a three-judge Court concerning the constitutional of 10 USC 6401; Pltfs exh 2 marked and received in evidence; Deft's exh A & B marked and received in evidence. Both sides argue. Pltf renews mot for permanent injunction; IT IS ORDERED cause shall stand submitted. (8) (Carter) (East)

4-11-73 Fld summons retnd unex for lack of instructions.

6-26-73 Fld opinion by Three Judge Court, Judges, East, Carter and Schwartz.

7-6 -73 Fld Deft's motion for new trial purs to rule 59(b) FRCP or in the alternative to amend finding purs to rule 52(b) FRCP. (Copies mld to Judges)

7-9 -73 Fld notice of motion for new trial NOTICED FOR 7-17-73 at 9:30 am; T/W affid of Captain E. R. Fink, Jagc U.S. Navy Assist Judge advocate General (Litigation & Claims)

7-16-73 Fld Pltf's opposition to motion for new trial or to amend findings.

7-17-73 Fld order and judgment.

1. Defts are permanently enjoined and restrained from mandatorily discharging Pltf Ballard solely because of passovers in grade in grade as provided for in 6382 prior to the expiration of 13 yrs of commissioned service, and
2. Pltf Ballard should be reinstated to all benefits, increments and placement on the USN list for promotion as he would have been entitled under law as of the close of June 29, 1972 had he not been considered subject to discharge short of thirteen yrs of continuous USN commissioned service. (Carter) (East) (Schwartz) Ent 7-18-73 MADE JS-6

7-16-73 HRNG MOTS—Ent ord mot for new trial is hereby submitted to 3 judge Court (8)

8-3 -73 Fld memo of P&A's in support of defts mot for a new trial or amendment of findings.

8-14-73 Fld Deft's NOTICE OF APPEAL

8-23-73 Fld order denying motion for new trial and to amend findings of fact and conclusions of law. (Carter) (East) (8) Mailed copies to counsel

9-20-73 Fld NOTICE OF APPEAL BY DEFTS.

[Filed June 16, 1972]

United States District Court, Southern District of California

No. 72-218-S

LT. ROBERT C. BALLARD, U.S.N., PLAINTIFF

v.

MELVIN LAIRD, SECRETARY OF DEFENSE; JOHN CHAFEE, SECRETARY OF THE NAVY; VICE ADMIRAL DAVID BAGLEY, U.S.N., CHIEF OF NAVAL PERSONNEL; CAPTAIN ROBERT H. LEMMON, U.S.N., COMMANDER FLEET TRAINING GROUP, SAN DIEGO, CALIF., DEFENDANTS

Complaint for declaratory judgment, injunctive relief and for temporary restraining order and application for a three judge court

Plaintiff LT. ROBERT C. BALLARD, U.S.N. alleges as follows:

IDENTIFICATION OF PARTIES

1. The plaintiff is LT. ROBERT C. BALLARD, U.S.N., who is presently attached to the Fleet Training Group, located at the Fleet Anti-Submarine Warfare School in San Diego, California.

2. Respondents are as follows:

MELVIN LAIRD is the Secretary of Defense and on information and belief he is a resident of the District of Columbia.

3. JOHN CHAFEE is the Secretary of the Navy and on information and belief he is a resident of the District of Columbia.

4. VICE ADMIRAL DAVID BAGLEY, U.S.N. is the Chief of Naval Personnel and on information and belief is a resident of the District of Columbia.

5. CAPTAIN ROBERT H. LEMMON, U.S.N. is the Commander of the Fleet Training Group (Com Fle Tra Gru) the

unit to which petitioner is presently attached, San Diego, California and on information and belief is a resident of San Diego, California.

JURISDICTION OF THE COURT OF THIS MATTER

6. This action, in part, is an action of declaratory judgment, pursuant to 28 USC Sections 2201 and 2202 for the purpose of determining questions of actual controversy between the parties as more fully set forth in the following allegations of this complaint. There is an actual justiciable controversy requiring a declaration of the rights of the parties.

7. Injunctive relief is sought pursuant to the general equity jurisdiction of this court and 28 USC Section 1331. The Federal Act under which plaintiff is being discharged from the United States Navy is unconstitutional in that its application to plaintiff deprives him of due process of law. The monetary loss to plaintiff due to this discharge in violation of due process exceeds $200,000.00.

8. This is likewise an action in the nature of mandamus, pursuant to 28 USC Section 1361, to compel defendants who are all officers and employees of the United States Government to perform duties owed to the plaintiff.

FACTUAL ALLEGATIONS

9. Plaintiff is a Lieutenant in the United States Navy and has been a commissioned officer since August 16, 1962 for a total of over nine years continuous active commissioned service. Prior to commissioning, plaintiff served seven years as an enlisted man.

10. Plaintiff has served with distinction in the United States Navy and with overall outstanding fitness reports. In all of plaintiff's fitness reports he has been recommended for promotion.

11. Despite plaintiff's outstanding service, plaintiff is presently scheduled to be discharged from the Naval Service for the sole reason that plaintiff has not been promoted to Lieutenant Commander during the nine years and 10½ months that plaintiff has been in active commissioned service. See Exhibit A attached hereto and incorporated herein.

12. Plaintiff has exhausted all administrative remedies available to him while on active duty to remain on active duty.

13. Plaintiff will be caused irreparable harm by his separation on June 30, 1972 as he will receive severance pay of not more than $15,000.00 as opposed to the $200,000.00 of benefits which would accrue to him if he were allowed to remain on active duty for approximately 2½ years from June 30, 1972.

14. If plaintiff were a female officer, plaintiff could not be discharged for failure of promotion until a total of 13 years active duty as an officer had been served. This is mandated by 10 USC Section 6401.

15. Plaintiff is being discharged under 10 USC Section 6382 despite the fact he has not served 13 years in the service as an active duty officer.

16. Plaintiff is being deprived of equal protection of the law under the Fourteenth Amendment of the United States Constitution in that plaintiff is being discharged earlier than if he were a woman officer.

17. Plaintiff alleges that were he a woman officer he would be allowed three chances at promotion vice the two chances he is allowed as a male officer.

18. Plaintiff alleges that 10 USC Section 6382 discriminates against him because of his sex when compared to 10 USC Section 6401 which applies to women and that this deprives plaintiff of a benefit solely because of his sex.

19. Plaintiff alleges that the United States Army and United States Air Force provide hearings to officers on request who are involuntarily severed due to failure of promotion.

20. Plaintiff alleges that no hearing has been offered him by the United States Navy despite his request for such hearing.

21. Plaintiff alleges that he would be able to present valuable and relevant information to a retention board concerning his value to the Navy if such a board were convened and such a retention hearing granted.

22. Plaintiff alleges that since a retention hearing is available in the Army and the Air Force, he is being denied the equal protection of the law since no such hearing is provided him in the Navy.

23. Plaintiff alleges that separation without such a hearing denied him of due process of law under the Fifth Amendment of the United States Constitution.

24. Plaintiff alleges that the Naval Service owes him the duty to retain him a minimum of 13 years active commissioned

service and that mandamus is appropriate to order such retention.

25. Plaintiff alleges that at the expiration of the 13 years active commissioned service if he has not been promoted, the United States Navy will still be required to provide him a retention hearing and that a declaration of that right is mandated by the allegations of this suit.

26. Plaintiff alleges that 10 USC Section 6382 is unconstitutional in that it deprives plaintiff of his livelihood without a hearing and without relation to his ability to perform his job.

APPLICATION FOR THREE JUDGE COURT

27. Based on the above allegations plaintiff applies for a three judge court pursuant to 28 USC Section 2282.

PRAYER FOR RELIEF

1. Plaintiff prays for a Temporary Restraining Order restraining the defendants from acting on their intention to discharge plaintiff until such time as a full and fair hearing is held in Federal District Court.

2. Plaintiff prays that at the end of the District Court proceedings, an injunction issue to prevent the discharge of plaintiff for failure of promotion until plaintiff has served at least 13 years active commissioned service and until he has received a hearing on the reason for such discharge.

3. Plaintiff prays for a declaratory judgment declaring that 10 USC 6382 is unconstitutional on its face and a further judgment that 10 USC 6382 is unconstitutional as applied to plaintiff.

4. Plaintiff prays for costs of suit and such other relief as the court may deem proper.

DATED: June 16, 1972.

CHARLES R. KHOURY, JR.,
Attorney for Plaintiff.

539-530—74——2

EXHIBIT A

DEPARTMENT OF THE NAVY,
BUREAU OF NAVAL PERSONNEL,
Washington, D.C., March 17, 1972.

From: Chief of Naval Personnel
To: Lieutenant Robert C. BALLARD, USN
Via: Commander
Fleet Training Group
San Diego
San Diego, California 92147
Subj: Resignation from the Naval Service
Ref: (a) Your ltr of 23 February 1972
(b) 10 USC 6382
(c) CHNAVPERS ltr Pers-B1603a-s-erp of 20 January 1972
(d) BUPERSMAN 1020330

1. In reference (a) you submitted your resignation from the naval service of the United States, and requested that it be accepted contingent on a Reserve appointment and continuation on active duty.

2. Reference (b) requires that officers of your category be honorably discharged on 30 June of the fiscal year they twice fail of selection for promotion to lieutenant commander. This provision of the law provides no latitude with regard to your continuation on active duty beyond 30 June 1972. Accordingly, your discharge will be processed for 30 June 1972 unless you request earlier separation as indicated in reference (c).

3. You may request a Reserve appointment in accordance with reference (d). The request must be unconditional. Such appointment, if tendered, would be in an inactive status only, but would enable you to work toward retirement points.

4. Your desire to continue on active duty is appreciated and it is regretted that your request submitted in reference (a) cannot be approved.

J. B. HASKINS.
By direction

[Filed July 13, 1972]

United States District Court, Southern District of California

Civil No. 72-218-S

AFFIDAVIT

Rear Admiral B. B. Forbes, Jr., U.S. Navy, being duly sworn, deposes and says:

1. I am an officer on active duty in the United States Navy. Since March 1972 I have served as Assistant Chief for Personnel Control, Bureau of Naval Personnel. Among other things, my duties include effecting the discharge of male officers pursuant to section 6382, title 10, United States Code.

2. Two hundred and thirty-eight male lieutenants of the Regular Navy were subject to the mandatory discharge from the Navy on June 30, 1972, pursuant to the provisions of section 6382, title 10, United States Code. Thirty-one of these officers had served more than 18 years active duty on June 30, 1972, and, after discharge, they were granted commissions as active-duty officers in the United States Naval Reserve. This was done pursuant to a long-established policy within the Navy.

3. Lieutenant Robert C. Ballard, U.S. Navy, is one of the 238 officers whose discharge is required by federal statute. Nine other lieutenants of the Regular Navy, all of whom have performed an equal or longer period of active duty than Lieutenant Ballard, and all of whose records of performance are as good as or better than his, were discharged pursuant to the statutory mandate.

/s/ B. B. FORBES.

[Filed September 13, 1972]

United States District Court, Southern District of California

Civil No. 72-128-S

AFFIDAVIT OF ROBERT F. CONNALLY

Robert F. Connally, being duly sworn, deposes and says:

1. I am a civilian Federal Government employee at the Bureau of Naval Personnel, Washington, D.C. Since 1956 I

have been employed as the Special Assistant for Promotions, Promotion and Retirement Division, Bureau of Naval Personnel. In this job, my duties require me to have an understanding of the federal statutes pertaining to the promotion, discharge, and retirement of officers in the United States Navy.

2. Congress has devised a complex statutory scheme providing for the appointment, promotion, retirement, and discharge of Navy officers. (10 U.S.C. chs. 539, 541, 543 & 545 (1970).) These statutes are designed to assure that, at any given time and under any given circumstances, an appropriate number of highly qualified officers of every rank are available for the purposes of national defense and security.

3. 10 U.S.C. § 6382 (1970) was part of the Officer Personnel Act of 1947 (OPA), Public Law 80–321, 61 Statutes-at-Large 395. The OPA contemplated that, under normal conditions, officers would be promoted by a system of permanent (vice temporary) promotions, although it provided for temporary promotions in order to cope with periods of mobilization and demobilization. Under the OPA there is contemplated a normal term of service for each rank. The normal term of service prior to promotion is three years for an ensign (0–1), 3 years for a lieutenant (junior grade) (0–2), and 6 years for a lieutenant (0–3). (See 10 U.S.C. § 5768 (1970).) Under this system, therefore, an officer in the grade of lieutenant who had twice failed of selection to lieutenant commander would not normally become subject to the mandatory discharge provisions of 10 U.S.C. § 6382 (1970) until he had served 13 years as an officer (3 years as an 0–1, 3 years as an 0–2, 6 years as an 0–3, plus 1 year between selection boards after having failed of selection to 0–4 for the first time). Thus, section 6382 contemplates the same 13-year period of service prior to discharge as does section 6401.

4. 10 U.S.C. § 6401 (1970) is part of the Women's Armed Services Integration Act of 1948 (WASIA), Public Law 80–625, 62 Statutes-at-Large 356. Unlike the OPA, the WASIA is based on a system of permanent promotions, and does not provide for temporary promotions.

5. Historically, however, due to events such as the Korean War, the Vietnam War, and interminable international crises, periods of "peace" or "normalcy" have been rare, and the system of permanent promotions for male officers has never been fully implemented. Normal terms of service between promotion have been the exception rather than the rule; each of these intervals between promotion have usually been shorter due to the increased needs for male officers of every rank, and selected officers have received temporary promotions in order to fill immediate personnel requirements. This has resulted in officers being promoted to (or failing of selection to) the grade of lieutenant commander after 7-to-9 years of active duty, instead of after the normal 12 years of active duty.

6. Where a woman officer in the line of the Navy has been passed over twice for promotion to lieutenant commander, her retention on active duty does not affect the opportunity of women officers in the line in the grade of lieutenant (junior grade) to be promoted to lieutenant. Pursuant to 10 U.S.C. § 5760 (1970), the number of women officers in the line of the Navy that may be recommended for promotion to the grade of lieutenant is equal to the number of women officers in the grade of lieutenant (junior grade). Thus, all women in the grade of lieutenant (junior grade) may be recommended for promotion to the grade of lieutenant, regardless of the number of women already serving in the grade of lieutenant. However, the rule with respect to male officers is different. Pursuant to 10 U.S.C. § 5756 (1970), the number of male officers in the line of the Navy that may be recommended for promotion to the grade of lieutenant is equal to the number of vacancies existing among officers in the grade of lieutenant, plus the number of additional vacancies estimated for the next 12 months, minus the number of officers on the promotion list for that grade. Thus, the number of promotion opportunities for the grade of lieutenant would be lessened if the twice-passed-over lieutenants were allowed to continue serving in that grade. This is one reason why 10 U.S.C. § 6382 (1970) provides that each officer on the active list of the Navy (which includes officers in the line) shall be discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander for the second time.

/s/ Robert F. Connally.

[Filed December 1, 1972]

United States District Court, Southern District of California

Civil No. 72-218-S

Answer

COME NOW defendants, by and through their attorneys, Harry D. Steward, United States Attorney, and Frederick B. Holoboff, Assistant U.S. Attorney, Southern District of California, and answer the complaint herein by admitting, denying and alleging as follows:

1. Answering paragraphs 1, 2, 4, 5, 12 and 15, admit the allegations thereof.

2. Answering paragraphs 6, 7, 8, 11, 13, 22, 23, 24, 25 and 26, deny the allegations thereof.

3. Answering paragraph 3, deny that John Chafee is the Secretary of the Navy and allege that John W. Warner is the Secretary of the Navy. Except as herein denied and alleged, admit the remaining allegations thereof.

4. Answering paragraph 9, admit that plaintiff is a lieutenant in the U.S. Navy and allege that plaintiff has been a commissioned officer in the U.S. Navy since August 17, 1962, prior to which date plaintiff served on active duty as an enlisted man in the U.S. Navy for a period of 6 years, 11 months and 17 days.

5. Answering paragraph 10, deny that plaintiff has served with distinction in the U. S. Navy with overall outstanding fitness reports and admit that in all of plaintiff's fitness reports he has been recommended for promotion.

6. Answering paragraph 11, deny the allegations thereof and allege that plaintiff's discharge from the U. S. Navy be not later than June 30, 1972, is required by 10 U.S.C. § 6382 (1970) for the reason that plaintiff has twice failed of selection to the rank of lieutenant commander.

7. Answering paragraph 14, deny the allegation thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970).

8. Answering paragraph 16, deny the allegations thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970). Further answering paragraph 16, allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

9. Answering paragraph 17, deny the allegations thereof and allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

10. Answering paragraph 18, deny the allegations thereof and allege that 10 U.S.C. § 6401 (1970) applies only to women officers appointed under 10 U.S.C. § 5590 (1970) and further allege that there are many women officers who are required to be discharged pursuant to 10 U.S.C. § 6382 (1970) such as women officers appointed under 10 U.S.C. §§ 5574, 5578a and 5579 (1970) and further allege that if plaintiff were a woman officer he would be permitted three chances at promotion only if he were a lieutenant appointed under 10 U.S.C. § 5590 (1970) and only if plaintiff's normal term of service in one or more of the grades of ensign, lieutenant (junior grade) and lieutenant were reduced for the purpose of early promotion due to the temporarily accelerated personnel needs of the Naval service.

11. Answering paragraph 19, are without information sufficient to form a belief with respect to the allegations thereof.

12. Answering paragraph 20, deny the allegations thereof

and allege that plaintiff was twice considered for promotion to lieutenant commander by separate boards of officers (10 U.S.C. § 5704 (1970)), each of whom was sworn to select among the eligible officers those whom the board considered "best fitted for promotion" (10 U.S.C. § 5707 (1970)). Selection of officers "best fitted for promotion" is based on their service records to which they have access at any time. Both times plaintiff failed of selection for promotion to lieutenant commander.

13. Affirmatively allege that the prohibition against plaintiff's discharge be removed or dissolved for as noted in *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 at 298 (CA 1, 1972). [T]he detriment to the Air Force in retaining officers it desires to retire [i.e., release from active duty or discharge] is at least as great as that of the officers retired. Moreover, if plaintiff ultimately prevails, he can be made whole by full compensation for back pay and restoration of full seniority rights; for these reasons, plaintiff should be denied further interlocutory relief. It should be noted that plaintiff's court-compelled continuation on active duty might have to be credited as time for retirement. It would be ironic and inequitable if plaintiff could win ultimate victory (entitlement to retirement) while losing his case on the merits.

WHEREFORE, defendants respectfully urge that the preliminary injunction heretofore issued be dissolved, that 10 U.S.C. § 6382 be declared constitutional on its face and as applied to plaintiff and for such other and further relief as to the Court may seem just and proper.

DATED this 1st day of December, 1972.

HARRY D. STEWARD,
United States Attorney,
ROBERT H. FILSINGER,
Assistant U.S. Attorney,
Chief, Civil Division,

FREDERICK B. HOLOBOFF,
Assistant U.S. Attorney,
Attorneys for Defendants.

[Filed December 21, 1972]

United States District Court, Southern District of California

No. Civil 72-218-S

Plaintiff's reply to defendants' answer

COMES NOW plaintiff by and through his attorney CHARLES R. KHOURY, JR. and replies to the answer herein by admitting, denying and alleging as follows:

1. Answering paragraph 3, admits that JOHN WARNER is now the Secretary of the Navy.

2. Answering paragraph 4, admits plaintiff has been a commissioned officer in the United States Navy since August 17, 1962. Plaintiff denies that he served on active duty as an enlisted man in the United States Navy for a period of six years, eleven months and seventeen days and affirmatively alleges that he was an enlisted man on continuous active duty from July 27, 1955 to August 16, 1962, a period of seven years and twenty-one days. Plaintiff further alleges that by February 20, 1973, he will have served over ten and one-half years as a commissioned officer for a total of seventeen and one-half years on active duty in the United States Navy.

3. Answering paragraph 6, denies the allegations thereof and denies further that the allegation is factual matter.

4. Answering paragraphs 7, 8, 9, 10 and 12, denies the allegations thereof.

5. Answering paragraph 13, denies the allegations thereof and further denies that it is proper factual matter.

6. Plaintiff affirmatively alleges that defendant has made no showing of compelling government interest in the discriminating effect of 10 U.S.C. §§ 6382 and 6401.

WHEREFORE, plaintiff respectfully requests that the preliminary injunction heretofore issued be made permanent, that 10 U.S.C. § 6382 be declared unconstitutional on its face and as applied to plaintiff and for such other and further relief as to the court may seem just and proper.

Dated this 18th day of December, 1972.

CHARLES R. KHOURY, JR.

[Filed March 8, 1973]

United States District Court, Southern District of California

Civil No. 72-218-S

Agreed Statement of Facts

Lt. Robert C. Ballard is a Regular Navy Lieutenant. As of June 30, 1972 he has served as an enlisted man for six years, eleven months, and seventeen days and as an officer for nine years, ten months, and fourteen days. As of March 8, 1973, his commissioned service has been increased by 251 days because the Navy has been and continues to be judicially enjoined from discharging him as required by 10 U.S.C. § 6382.

On June 30 of the year in which Lt. Ballard had failed to be promoted for the second time (1972), he was ordered discharged from the Naval Service solely due to the effect of 10 U.S.C. § 6382.

Pursuant to 10 U.S.C. § 6382, he is entitled to severance pay. If he is permitted to retire, he would be entitled to retirement pay and privileges which potentially far exceed what he would receive as severance pay.

/s/ Charles R. Khoury, Jr.,
Attorney for Plaintiff.

/s/ Frederick B. Holoboff,
Attorney for Defendants.

[Filed July 9, 1973]

United States District Court, Southern District of California

Civil No. 72-218-5

Affidavit of Captain E. R. Fink, JAGC, United States Navy, Assistant Judge Advocate General (Litigation and Claims)

Affidavit

1. There is no question but that the court's conclusion in the opinion in this case accurately notes that there are differences

between the personnel rules applicable to some Regular Navy and Marine Corps women officers and those applicable to Regular Navy and Marine Corps male officers. The court did not have before it, however, sufficient evidence to accurately assess the exact nature of these differences, the reasons for them, and exactly to which communities of officers within the naval service they apply.

The Department of the Navy is desirous of offering extensive evidence to provide the court with an analysis of the above factors, with additional information which the court should consider before a final decision is rendered concerning whether or not the differences which exist are constitutionally impermissible discrimination on the basis of sex.

Furthermore, the Department of the Navy feels that it is essential that the court be fully apprised of the nature of the statutory system of officer personnel management, and the current proposals which are under study for modifying that system. This is necessary for, if constitutionally impermissible discrimination does exist, it should be remedied in such a manner as not to disrupt the entire fabric of the officer personnel structure. In this latter regard, it is noted that there are approximately 72,000 officers on active duty in the Navy (as of November, 1971) of which only 3,233 are female. Of this latter number only approximately 167 were female officers who may become subject to 10 U.S.C. § 6401. At this same time, there were approximately 16,585 male officer lieutenants who, if the *Ballard* decision becomes final, could then be governed under 10 U.S.C. § 6401. If the differences existing between these male and female officers represent unconstitutional discrimination on the basis of sex, the remedy obviously is to bring the female officers into conformity with the larger male community. Current proposals for such modification should be made available for the court's study.

2. Historically, until World War II, the officer corps of the Navy was comprised essentially of males. Women served only as nurses prior to that time and, during World War I, women served in the Navy in administrative functions known as Yeomen "F". Women did serve in the Naval Reserve during World War II on active duty, but did not hold tenure and were not members of the Regular Navy until the "Womens Armed Services Integration Act of 1948," Act of June 12, 1948, Pub. L. No. 80-625, 62 Stat. 604. Section 6401 of Title 10, *United States*

Code, the comparative basis used by the court in this case, finds it genesis in this act.

Promotions in the Navy prior to 1862 were accomplished through the process of promoting the senior officer in the next lower grade. By the Act of July 16, 1862, ch. 183, 12 Stat. 584, officers continued to be promoted on the basis of seniority but their promotions were subject to the recommendations of a naval examining board. This system resulted in the slow advancement of young officers and in old, and sometimes senile, officers occupying the senior grades. It may be stated, generally, that the only means of separating an officer for incompetence was separation for failure to meet professional qualifications on promotion. Of course, officers could be separated by physical incapacity or could be voluntarily separated. Voluntary retirement was not available until an officer had forty years of service.

In 1916, Congress first provided a selection system within the Navy promotion system when it passed the Act of August 29, 1916, ch. 417, 39 Stat. 556. This system applied to officers serving in the grades of Captain, Commander, and Lieutenant Commander who were considered for promotion to the next higher grade. An officer whose junior was selected for promotion was considered to have "failed selection," and he was then subject to involuntary separation. This system had its shortcomings. It resulted in a high attrition rate and subsequently in reluctance on the part of selection boards to select any but the more senior officers for fear of giving a "failure of selection" to a competent officer whose junior they might otherwise have wanted to recommend for promotion. It also resulted in significant year-to-year fluctuations in both attrition rate and promotion opportunity for officers considered. These problems were addressed by the Act of June 23, 1938, ch. 598, 52 Stat. 944, in a rather unique manner. Officers in the grade of Lieutenant, Lieutenant Commander, and Commander who were considered by a selection board to be "best fitted" were promoted to the next higher grade. Officers not so recommended were subject to attrition; however, the board could designate such an officer, if he had previously failed selection as "fitted." This latter designation would entitle him to remain on active duty in his present grade for a limited period at the discretion of the President, but if he was not retained on active duty, he

was, under the law, promoted and retired. With the onset of World War II, officers were given only temporary promotions by virtue of the Act of July 24, 1941, ch. 320, 55 Stat. 603, which had as its stated purpose, "authorizing the temporary appointment or advancement of certain personnel of the Navy and Marine Corps, and for other purposes." There were no involuntary separations or retirements, except as a result of physical disability. The temporary promotion system was administered by the services substantially by regulation and without benefit of the selection board process. All of the services found that their officer corps far exceeded their requirements immediately after the cessation of hostilities. The Navy started working on this problem in the spring of 1946. The result of this effort and efforts in the other services culminated in the "Officer Personnel Act of 1947," Act of August 7, 1947, ch. 512, Pub. L. No. 80–381, 61 Stat. 795 (OPA). Although technically repealed almost in totality by the Act of August 10, 1956, ch. 104, Pub. L. No. 84–1028, 70A Stat. 1, the substantive law established by OPA remains as the statutory basis for officer promotions and nondisability separation and retirement in the naval service to this day. The Act of August 10, 1956, *supra*, merely codified the language of OPA into Title 10 of the *United States Code*. Section 6382 of that title, the section considered by the court to be discriminatory in this case, is founded in section 312(h) of OPA.

The stated purpose of OPA is "to provide for the promotion and elimination of officers of the Army, Navy, and Marine Corps, and for other purposes." The concept of OPA and related laws as they apply to promotions and attrition of officers of the grades of Lieutenant through Captain, is essentially as follows. There is a grade distribution table which permits a specified number of line officers in each officer grade, based upon the total number of line officers considered. 10 U.S.C. § 5442. (Generally, all line officers on active duty are considered, except for retired officers and certain classes of Reserve officers.) The Secretary of the Navy must establish a "prescribed number" of line officers who may serve in each grade and that number must be within the statutory grade tables. 10 U.S.C. § 5441. When an officer leaves or is removed from a grade for any reason, including promotion to a higher grade, a vacancy is created; that is, there are less officers in that grade than the

number prescribed for that grade by the Secretary, and the senior officer on a promotion list to that grade is promoted to fill the vacancy. 10 U.S.C. § 5769. Accordingly, once each year the Secretary of the Navy determines the estimated number of officer promotions that will be needed to satisfy the vacancies which are anticipated, in each grade, during the ensuing year. 10 U.S.C. § 5756. It is desirable to provide a reasonable expectancy of promotion to highly qualified officers and to preclude a loss to the Navy of highly motivated officers who would not remain with the service if promotions were stagnated. The Secretary, therefore, establishes a promotion opportunity for each grade which is reasonable yet may be less than ten percent. The promotion opportunity during recent years to the grade of Lieutenant Commander has been eighty-five percent. Essentially, this means that all lieutenants of the line of the Navy have an eighty-five-percent opportunity to be promoted to Lieutenant Commander. This opportunity is established by the creation of a promotion zone of such a size that eighty-five percent of the officers in the zone may be recommended for promotion. 10 U.S.C. § 5764. It must be recognized that above-zone or below-zone selections come from the in-zone selection opportunity, so that the actual chances for selection would be somewhat less than eighty-five percent. The promotion zone constitutes all officers who are considered for promotion for the first time under penalty of acquiring a "failure of selection" (10 U.S.C. § 5776), if not selected for promotion. [Officers who have previously "failed of selection" are considered for promotion so long as they remain on active duty but they are not included in the number of officers in the promotion zone (called above-zone). Likewise, officers may be considered for promotion who are junior to the promotion zone, and if not selected do not incur a "failure of selection" (called below-zone).]

Turning now to the involuntary separation or retirement of officers, 10 U.S.C. § 5768 sets forth what was intended to be the "normal terms of service" for line officers in each grade. It is noted that it was intended that a Captain serve thirty years, a Commander Twenty-five years, a Lieutenant Commander eighteen years, and a Lieutenant twelve years before promotion to a higher grade. This means that an officer who twice failed of selection to Rear Admiral would normally be in his thirty-first year, to Captain in his twenty-sixth year, to Commander in his nineteenth year, and to Lieutenant Commander in this thirteenth year. The law then, as now, provides that twenty years active service is necessary for voluntary retirement. 10 U.S.C. § 6323. Accordingly, retirement was contemplated for officers who reached the grade of Lieutenant Commander or above. Since officers of the grade of Lieutenant would normally not exceed thirteen years before their second failure of selection, it was provided that they would be separated but with severance pay.

Shortly after Congress passed the "Officer Personnel Act of 1947" it passed the "Womens Armed Services Integration Act of 1948" which was the source law for 10 U.S.C. § 6401, the basis for comparison in the *Ballard* case, *supra*. It was the "Womens Armed Services Integration Act of 1948" which first authorized women to serve in the Regular Navy. There is a distinction between 10 U.S.C. § 6382 and 10 U.S.C. § 6401. Under 10 U.S.C. § 6382, a male lieutenant and some female lieutenants are required to * * * be honorably discharged on June 30 of the Fiscal Year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander or major for the second time * * *. Under 10 U.S.C. § 6401, a woman lieutenant appointed under 10 U.S.C. § 5590 is required to "be honorably discharged on 30 June of the Fiscal Year in which—(1) she is not on a promotion list; and (2) she has completed 13 years of active commissioned service." It should be noted that a 10 U.S.C. § 5590 woman lieutenant is not guaranteed an opportunity to be considered for selection and may be discharged without having been considered for promotion to lieutenant commander. It is also noted that the "Womens Armed Services Integration Act of 1948" did provide different rules for the administration of women officers appointed under the authority of that law, although it tried to follow the same general concepts. For instance, there was no opportunity for selection of women officers to the grade of Captain; one woman officer could be detailed to be the Assistant Chief of Naval Personnel for Women (10 U.S.C. § 5743) and "while so serving" be entitled to the privileges of that grade. Also, only ten percent of the women officers of the Navy could serve in the grade of Commander and only twenty percent could serve in the grade of Lieutenant Commander. The promotional system for women, although similar to that for male officers, is separately administered. The above differences formed the basis for the separate treatment of women officers

(appointed under 10 U.S.C. § 5590) under 10 U.S.C. § 6401. The thirteen year provision and the severence pay provisions were clearly designed to treat women the same as men were treated in relation to involuntary separation. Hearings, Senate Comm. on Armed Services on S. 1527 (subsequently as S. 1641) 80th Cong., 1st Sess., p. 39 (1947). Although the promotion features in this women's law were altered in an effort to provide more nearly equal opportunity for women by the Act of November 8, 1967, Pub. L. No. 90–130, 81 Stat. 374, the provisions relating to the separation of women lieutenants were not changed.

As noted above, the laws relating to male lieutenants and female lieutenants appointed under 10 U.S.C. § 5590 were designed to provide essentially the same treatment in relation to their involuntary separation. Contrary to this effort toward equality, the laws regarding time in grade for consideration for promotion to the next grade were suspended by section 48 of the Act of August 10, 1956, *supra*.

There are forty separate categories of officers above the grade of Chief Warrant Officer–4 in the Navy, all different from the others in some respects. Some of these categories are all women; some all men; and some both men and women. For example, both male and female nurses are subject to a thirteen-year rule, 10 U.S.C. § 6396, similar to 10 U.S.C. § 6401, and female officers of some of the various staff corps, that is, not of the line, are subject to the failure-for-selection rule applicable to Lieutenant Ballard, 10 U.S.C. § 6382. The separate rules for line officers restricted from combat duties should not be applied to other categories just because there are differences between categories, for these differences are based upon personnel needs of the Navy as reflected in the law. Rather, if the court is to take corrective action, it should be to open up the restricted-to-female line category to males, and the restricted-to-male line category to females, and not to give the best features of each category to those in other categories who so request. Section 6401 applies only to Section 5590 women who are only a part of the women officers of the Navy—approximately six percent. Contrary to the court's finding, some women officers are also subject to Section 6382. There are differences in officer competitive categories, but these differences are based on different circumstances. Section 6401 originated out of the Womens Armed Services Integration Act of 1948, which was the law bringing women into the Regular Navy. At the time of its

writing there was no Regular women officer corps. This law was designed to integrate women into the Regular Navy and to treat them as nearly equally as possible with men but subject to certain necessary differences resulting from the fact that they were a new officer corps. The legislative history shows such intent. At the time of that law, men were subject to a second failure of selection at the thirteen-year point. Due to the influx of personnel ino the Navy during Korea, Vietnam, and for other reasons, the point at which a second failure of selection would occur has become much earlier as a result of the suspension of time-in-grade provisions.

The Navy and Congress have taken steps to correct differences between women categories and male categories. There was Pub. L. 90–130, and the Navy has recently had a task force make recommendations for legislative changes, most of which are now being incorporated into the "Defense Officer Personnel Management Act," presently being staffed through all the services in draft form. This makes many changes in officer personnel administration, including the elimination of the very same distinctions between men and women which are the subject of this lawsuit. It is the male line officer provisions, however, to which other categories of personnel are being conformed; female officers are being brought entirely under the provisions governing the appointment, promotion, and involuntary separation of male officers.

3. Lieutenant Ballard's opportunities for promotion within the above-described system should be clarified by evidence.

Findings of fact numbers 1 and 2 stated that Lieutenant Ballard served with distinction for seven years as an enlisted man, and for over nine years as a commissioned officer. It fails to note that Lieutenant Ballard's enlistment, his rise through the enlisted ranks, his selection for a commission, and his prior officer promotions were all obtained in a system which generally discriminated against women, although on any given isolated matter there may be discrimination in either direction. Although legislative and administrative actions have attempted from time to time to equalize the status of women in the Navy with that of men, the basic fact remains that women are denied equal opportunity to be commissioned, they have been denied equal promotional opportunities, they are presently barred from participating in the major purpose of the Navy, service on most naval vessels and on aircraft engaged in combat, 10

U.S.C. § 6015, and they have been denied selection to Rear Admiral. It was only to compensate for these distinctions that Congress favored women at this point, if, indeed, the statute does favor women. (Lieutenant Two sued because she thought the two statutes favored men, since a woman could be forced out without even having failed of selection, and because of the fact that a woman has to serve longer to gain rights to separation pay; *Two* v. *U.S.*, Civil No. 9752, W.D. Wash., Dec. 21, 1971). If Lieutenant Ballard is to prevail here, he obtains the best of both worlds.

In the discussion on page 6 of the opinion, it is noted that the court makes a point that no evidence was presented that, "having failed of selection for promotion" or "is not on a promotion list" is necessarily related to quality of service. As Lieutenant Two alleged, a woman can be forced out without having failed of selection just because her name is not on a promotion list at the end of thirteen years of commissioned service. Involuntary separation of a lieutenant without a failure of selection, is not related to the quality of service, as the court found. For Lieutenant Ballard, however, "having failed of selection for promotion" means that his record was considered with those of all other eligible lieutenants and because of an approximately eighty-five percent selection opportunity, he was deemed twice, by different boards (no one can serve on successive boards) to have been in the bottom fifteen to twenty-five or thirty percent of all lieutenants in the Navy then eligible for promotion. Surely this is directly related to the quality of his service. As a matter of fact, the court makes note that Lieutenant Ballard was recommended for promotion. His actual record as an officer contains twenty-two reports on his fitness, eight of which recommend promotion and fourteen of which make no such recommendation. This silence, while not adverse, certainly indicates that he is less qualified for promotion than the majority of his peers.

Should the *Ballard* decision become final, a seriously adverse impact would be felt by the community of young naval reservists, both male and female, currently on active duty. The court notes on page 7, that some 238 U.S. Navy lieutenants were subject to discharge on June 30, 1972. The court should also note that, in reliance on their opinion in this case, several lieutenants slated for discharge on June 30, 1973, have filed a class action and have had their discharges stayed (*Ingram*). Some 204

lieutenants are involved. The result of this action, if successful, could be to force out 630 Reserve lieutenants (junior grade)—because of fiscal restraints—who have never failed of selection and who are not entitled to separation pay. This ruling in *Ballard*, therefore, if left unchanged, takes away constitutional authority of the Executive Branch and places it in the Judiciary Branch, and leaves the Navy less able to carry out its mission. Evidence to be presented will show that the budget impact of retention of 204 lieutenants is $3.1M (based on FY '74 Presidential Budget—one Lieutenant for one year at $15,301). In order to compensate for the continued active duty of these 204 planned losses, some action must be taken to reduce expenditure. The following are the most likely possibilities:

a. The early involuntary release of 630 Reserve lieutenants (junior grade) who are expected to leave active duty during FY '74 (up to six months early) plus an early involuntary release of 204 Reserves in FY '74 who would be expected to leave during FY '75.

b. An involuntary early release of 204 Reserve officers who are not otherwise expected to leave active duty during FY '74 plus a six-month delay in all promotions to the grade of Lieutenant and Lieutenant (Junior Grade) would provide the necessary cost off-set.

If the court means, by this decision, that the entire separate status of women in the Armed Services is to be eliminated as unconstitutional, this far-reaching decision should be implemented gradually by a plan, and not haphazardly piecemeal. For instance, women officers now in service cannot match prior combat experiences of their male counterparts, and would stand little chance for selection by a selection board also considering males. If the court considers this to be the law, it should call for plans from the services, as is done in school-busing cases.

It must be noted that as of November 30, 1972, there were on active duty in the Navy, approximately the following numbers of officers:

	Male	Female
U.S. Navy	42,111	1,206
U.S. Navy (Temporary)	6,662	1
U.S. Naval Reserve	19,683	2,026

It is apparent, therefore, that of the 71,689 officers on active duty last November, only 3,233 were female. The following statistics concern the only women in the Navy who are subject to the law which Lieutenant Ballard claims discriminates against him. The figures are for December 31, 1972:

	Line	Supply Corps
Flag	0	0
Captain	10	2
Commander	41	5
Lieutenant Commander	98	2
Lieutenant	163(2)	6
Lieutenants (Junior Grade) and Ensigns	396(218)	10(9)
Totals	708	25

The figures in parenthesis are Reserve officers, who must either be selected for, and augmented to, Regular status as lieutenants or be separated. There are 167 women Regular lieutenants, total, and only a few of these at most are in Lieutenant Ballard's promotional dilemma. The court's proposed order would upset the entire, complex, promotional system of the Navy because a few female officers *may* have a particular advantage not available to Lieutenant Ballard.

/s/ E. R. Fink,
Capt JAGC USN.

[Filed August 3, 1973]

United States District Court, Southern District of California

Civil No. 72-218-S

AFFIDAVIT

Affiant, first being duly sworn, states, and alleges upon his oath, as follows, to wit:

1. I am Rear Admiral G. E. R. Kinnear, II, U.S. Navy, Assistant Chief of Naval Personnel for Plans and Programs.

BACKGROUND

2. During 100 years the Navy has evolved upon a rigorous philosophy in the development of officers: the concept of promotion or, alternately, dismissal. This "up or out" philosophy continues through today.

3. At one time nearly all officers in the Navy were identified by a unique category of naval service "eligible to command at sea." Increasing technological and scientific requirements gave rise to categories of officers whose assignment was more specialized or limited than the unrestricted line officer who was eligible to command at sea. Over the years a need for protection of the promotion opportunity in the smaller, technically oriented, or otherwise unique categories, from incursions by the larger category of officers (eligible to command at sea) was readily apparent to the Congress, and Congress responded by enacting separate requirements and protections for these smaller categories of officers.

4. The system of statutes which has evolved was based on the rules developed for the male unrestricted line officers. This category is the basis of the Navy's promotion system.

PROMOTION AND ELIMINATION OF OFFICERS

5. Promotion statutes provide for both the advancement to higher grade and the elimination of officers resulting from lack of advancement. These statutes have been developed over a long period of time and are, in general, considered reasonable. They provide for the development of high quality, dedicated naval officers. The promotion procedures applicable to male unrestricted line officers have been extended to apply to all other categories, with minor modifications. Differences do exist between categories; however, these differences exist by design in order to protect a category of officers.

6. In enunciating the rules applicable to other than male unrestricted line officers, the Congress provided parallel but distinct promotion parameters. For instance, the restricted line is guaranteed no less than the opportunity for promotion applicable to the unrestricted line. A similar but uniquely different rule applies to Staff Corps officers. These rules were developed to provide similar opportunities under law while meeting service needs in the particular category. Just as Congress applied rules to promotion opportunity so also did Congress provide for equivalent promotion flow in many categories, establishing the norms for expected promotion points in terms of years of service.

7. The procedures for processing officers from lieutenant to the next higher grade also provide for the elimination of those officers who do not advance after having been twice considered for promotion. This elimination process is not related to a desire to avoid payment of retirement benefits and is not required because of the lack of vacancies in the higher grade.

8. When viewed in isolation an officer not selected for promotion to the grade of lieutenant commander may appear to someone not familiar with the pattern of fitness reports as possessing the requisite qualification for promotion; however, to a promotion selection board that officer appeared less fitted for promotion than his contemporaries.

9. An absolute scale to measure an officer's performance is not available, and it is incorrect to presume that such a scale exists. Each officer competes with his contemporaries on his own record. Not all can or should be selected. The less well qualified are eliminated.

ROLE OF WOMEN

10. Congress was aware of the role of women in the armed services when enacting legislation providing for their management. Women are not provided equal status in the Navy. Women may not be assigned to duty on "vessels of the Navy other than hospital ships or transports" or to duty in "aircraft that are engaged in combat missions." Accordingly, women are not legally qualified for command at sea. While it is true that women have been ordered to command, there still exists a categorical difference between "command at sea" and "command."

11. Because women do not serve in a combatant ship environment or in command at sea, they are not on an equal footing for promotion with males eligible for command at sea. Norms were established for the administration of women's promotion which approximated the peacetime norms anticipated for males in the unrestricted line. That these norms have not been achieved represents the non-combatant orientation of the categories to which women are directed as compared to the more war-like categories toward which men are directed.

12. Current circumstances in the Navy find several categories of officers, male and female, who, by virtue of their category, may be released at different times. These releases are accomplished in accordance with long established custom and appro-

priate statutory provisions. Rights and benefits are established by category of service. Thus, members of one category may be entitled to certain benefits and advantages that would not apply to members of other categories. The fact that a certain category receives a certain benefit does not mean that members of other categories are discriminated against, for members of other categories are only entitled to those benefits which accrue to their category.

SUMMARY

13. Naval officers are organized into distinct categories; such as line, restricted line, Nurse Corps, etc., based upon the nature of their service. Differences in promotion and separation laws do exist between categories; however, these differences are designed to provide, to the extent possible, equitable treatment for all officers. The laws and benefits, applicable to a category are applied dispassionately. Individual officers volunteer for service in a category and are treated equally with others in the category.

/s/ G. E. R. KINNEAR, II,
Rear Admiral, U.S. Navy.

In the Supreme Court of the United States

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL.,
APPELLANTS

v.

ROBERT C. BALLARD

APPEAL from the United States District Court for the Southern District of California

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted.

FEBRUARY 19, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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JAMES R. SCHLESINGER, SECRETARY OF DEFENSE
ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

On Appeal From The United States District Court For
The Southern District Of California

MOTION TO DISMISS OR AFFIRM

CHARLES R. KHOURY, JR.
836 Prospect Street
La Jolla, California 92036

Attorney for Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

On Appeal From The United States District Court For
The Southern District Of California

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and orders of the District Court be affirmed or the appeal be dismissed on the grounds that the decision of the District Court is clearly correct under the principles established by this Court in Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971) and that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellee adds to appellants' statement of the case the following.

This is a direct appeal from a decision of a three judge District Court finding unconstitutional the mandatory discharge provisions of 10 U.S.C. 6382.

The three judge court found that statute to be violative of the due process clause of the Fifth Amendment insofar as that statute directs the involuntary discharge of male U.S. Navy officers prior to the expiration of 13 years of commissioned service while 10 U.S.C. 6401 guarantees 13 years tenure to similarly situated female naval officers. The court found that the legislatively guaranteed tenure time of commissioned service granted to women under section 6401 is an inherently suspect classification and the effect of the tenure provision was to invidiously discriminate against similarly circumstanced male naval officers who are mandatorily discharged before completing 13 years of commissioned service.

The three judge court further found that the provisions of 10 U.S.C. 6382 are "legislative fiscal outlay saving devices for the weeding out of a surplus of U.S.N. officers in a given grade before the vesting of retirement benefits" (Opinion of the three judge court, page 15a of Appendix B of appellants' jurisdictional statement).

The three judge court found on substantial evidence, that appellee Lt. Ballard had served over 17 years in the Navy as an officer and enlisted man; that he had served with overall outstanding fitness reports and had been recommended for promotion in all those fitness reports. The court further found that if he had been allowed to serve 13 years as a Lieutenant, as he would if he were a woman, he would receive retirement benefits of approximately $200,000.00 as opposed to the $15,000.00 severance pay he was to receive under 10 U.S.C. 6382. The statement that Lt. Ballard's performance was only "satisfactory" and that "he was considered to be in the lower 15 percent of eligible lieutenants by two separate selection boards" appearing in the jurisdictional statement at the top of page 4 is not supported by the facts and was not a finding of the court below.

ARGUMENT

The appellants present two arguments why this court should note probable jurisdiction.

1) The three judge court erroneously applied the compelling governmental interest test to the difference in treatment based on sex resulting from the guaranteed tenure provision granted to women under 10 U.S.C. 6401.

2) In any event the differences between 10 U.S.C. 6382 and 6401 are in fact supported by a compelling governmental interest.

A. THE USE OF THE COMPELLING GOVERNMENTAL INTEREST TEST IS PROPER UNDER FRONTIERO V. RICHARDSON, 411 U.S. 677.

The only case law cited by appellants to support their contention that it is not a proper test is Orloff v. Willoughby, 345 U.S. 83, 94 (1953) cited at page 8 of the jurisdictional statement. That case is most inapposite. At the cited page appears the well known statement by Justice Jackson that "orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Orloff, supra at page 94. Invidious discrimination on the basis of sex is not a legitimate Navy matter nor was it a legitimate Air Force matter in Frontiero v. Richardson, supra. Appellants have cited no authority, therefore, which would preclude the use of the compelling governmental interest test in examining a statute which discrimates on the basis of sex. Frontiero, supra is, of course, ample authority for the application of that test to classifications on the basis of sex and also in the context of classifications on the basis of sex in the Armed Services.

In any event, the three judge court also applied the rational basis test to this case and found it not to have

been satisfied and that is next discussed.

B. THE COURT BELOW FOUND NEITHER A RATIONAL BASIS NOR A COMPELLING GOVERNMENTAL INTEREST TO SUPPORT THE TENURE GRANTED FEMALE AND DENIED MALE NAVAL OFFICERS UNDER 10 U.S.C. 6401 and 10 U.S.C. 6382.

Appellants' jurisdictional statement secondly asserts this Court should note probable jurisdiction since a compelling governmental interest does exist to support the statutory scheme found unconstitutional by the court below (p. 8 of jurisdictional statement). The court below did not limit itself to the compelling interest test but also applied the rational basis test and found no rational basis to support the tenure granted female and denied male naval officers under 10 U.S.C. 6401 and 10 U.S.C. 6382 (p. 18(a) 3rd paragraph of Appendix B of jurisdictional statement).

The jurisdictional statement raises again the issue of rise and fall of national emergencies as it effects the promotion of naval officers causing them to reach the involuntary discharge point at 9 years as opposed to 13 years as was contemplated by Congress when 10 U.S.C. 6382 was enacted (jurisdictional statement at p. 10). The court below spoke clearly to this issue in both its memorandum granting a pre.iminary injunction and its opinion granting a permanent injunction (p. 15a of jurisdictional statement). If anything, this argument by appellants strengthens Lt. Ballard's case because it shows the legislative intent to

treat male and female officers equally vis à vis involuntary discharge at 13 years of commissioned service for both. This statement at page 10 and footnote 10 of the jurisdictional statement contradicts completely the statement at page 12 of that same jurisdictional statement that the court below gave "males a benefit not intended by Congress." The statute 10 U.S.C. 6382 unconstitutionally fails to incorporate that congressional intent of equality.

The jurisdictional statement points out that Congress is considering equalization of male and female Navy lieutenants by substituting for section 6401 the same provisions which govern male Navy lieutenants in section 6382 (fn. 15 of jurisdictional statement). Once again this strengthens Lt. Ballard's argument that unconstitutional disparate treatment exists and weakens that of appellants' that somehow the Navy must have this disparate treatment to function properly.

Finally, at the end of the jurisdictional statement appears the quote from Frontiero, supra that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members", 411 U.S. at 686-687. One need only substitute male for female in the above quote and it is applicable to Lt. Ballard who, but for

the court below, would have been discharged by the turn of the calendar. Who can contend that this is not an inferior status to a woman Lieutenant who can continue in service for 13 years regardless of times passed over?

CONCLUSION

This Court has recently heard and decided Frontiero v. Richardson, supra, a case dealing with a statutory scheme of fiscal importance to the military involving disparate and discriminatory treatment due to sex. The instant case decided below presents no substantial issues for this Court's consideration and follows Frontiero, supra. That this case finds the male to have been discriminated against is not a sufficient reason to note probable jurisdiction as illustrated by this Court's denial of a hearing in Diaz v. Pan American World Airways Inc., 442 F.2d 385, cert. denied at 404 U.S. 950 (sex discrimination to prevent male from being airline steward), and more recently in Moritz v. Commissioner, 469 F.2d 466, cert. denied at 41 L.W. 3616 (denial of due process to give income tax deduction to single woman caring for invalid mother while withholding same from similarly circumstanced single man).

It is respectfully submitted that the appellants present no substantial questions for the decision of this Court and that the judgment and orders of the District Court should be affirmed or the appeal should be dismissed.

Respectfully submitted,

/s/ CHARLES R. KHOURY, JR.

Charles R. Khoury, Jr.
836 Prospect Street
La Jolla, California 92036

Attorney for Appellee

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. B) is reported at 360 F. Supp. 643. The memorandum opinion of the district court granting appellee's motion for a preliminary injunction (J.S. App. A) is reported at 350 F. Supp. 167.

JURISDICTION

The judgment of the three-judge district court (J.S. App. D), enjoining the discharge of appellee Ballard, was entered on July 18, 1973. A notice of appeal was filed on August 14, 1973 (J.S. App. E). The government's motion for a new trial, filed July 6, 1973 (J.S. App. C), was denied on August 23, 1973 (J.S. App. F). A second notice of appeal was filed on September 20, 1973 (J.S. App. G). The jurisdictional statement was filed on November 13, 1973, and probable jurisdiction was noted on February 19, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the district court erred in using the "compelling governmental interest" test, rather than the "rational basis" test, in reviewing the constitutionality of military statutes creating differences in personnel administration based on sex.

2. Whether the differences in the Naval attrition statutes relating to men and women lieutenants (10 U.S.C. 6382 and 6401, respectively) are in violation of the Constitution.

STATUTES INVOLVED

10 U.S.C. 6382 provides in relevant part:

> (a) Each officer on the active list of the Navy serving in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander * * * for the second time.

10 U.S.C. 6401 provides in relevant part:

> (a) Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant * * * shall be honorably discharged on June 30 of the fiscal year in which—
>
> (1) she is not on a promotion list; and
>
> (2) she has completed 13 years of active commissioned service * * *.

STATEMENT

The appellee, Lieutenant Robert C. Ballard, U.S.N., having twice failed of selection for promotion to lieutenant commander, was scheduled for discharge from the Navy no later than June 30, 1972, pursuant to the mandatory requirement of 10 U.S.C. 6382(a). That statute is a typical one requiring thinning of the ranks to retain the best qualified officers and to permit orderly promotion of lower ranking officers.[1] Although Lt. Ballard's performance of his duties was satisfactory, he was considered to be in the lower 15 to 30 percent of eligible lieutenants by two separate selection boards, and was not recommended for promotion (App. 24a). Hence, he became subject to the mandatory discharge requirement of 10 U.S.C. 6382. As an officer discharged under

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[1] See *infra*, pp. 12-17.

10 U.S.C. 6382, Lt. Ballard would be entitled to $15,000 severance pay. 10 U.S.C. 6382(c).

On June 16, 1972, Lt. Ballard filed suit in the district court, alleging that 10 U.S.C. 6382 was unconstitutional in requiring his discharge after (in his case) some nine years of commissioned service, whereas 10 U.S.C. 6401(a) required discharge of women Navy lieutenants not on a promotion list only after 13 years of commissioned service.[2]

A three-judge court, convened under 28 U.S.C. 2282, granted a preliminary injunction enjoining appellee's discharge pending a final decision[3] (J.S. App. A). Following presentation of additional affidavits and other documents, and a hearing, the court concluded that the 13-year selection out provision of 10 U.S.C. 6401 favors women Navy officers and constitutes an invidious discrimination against male Navy officers mandatorily discharged under similar conditions before completing 13 years of service (J.S. App. B, p. 19a). The court, citing *Frontiero* v. *Richardson*, 411 U.S. 677, held that the "compelling governmental interest" test applied, and that the differences between 10 U.S.C. 6382 and 6401 were not supported by any compelling interest perceptible to it.[4] The court enjoined the government from dis-

[2] See *infra*, pp. 17-19.

[3] A temporary restraining order had previously been entered on June 20, 1972.

[4] The district court also found that there was no evidence of a rational basis for the added tenure granted women officers. J.S. App. B, p. 18a. See *infra*, p. 7, n. 9.

charging Ballard "solely because of passovers in grade as provided for in Section 6382 prior to the expiration of 13 years of commissioned service * * *" (J.S. App. B, p. 20a, J.S. App. D, p. 23a).

After the court issued its written opinion (on June 26, 1973), and prior to the entry of its judgment (on July 18, 1973), the government on July 6, 1973 filed a motion for a "new trial" (J.S. App. C, pp. 21a-22a), and two additional affidavits.[5] This affidavit pointed out that, of a total of 71,689 officers on active duty in the Navy (as of November 1972), 68,456 were men and only 3,233 were women (App. 17a, 25a-26a); that all male Navy lieutenants in the Regular Navy (numbering 16,585) would be guaranteed a 13-year tenure if the court's order should be followed and upheld (App. 17a);[6] that there are only 167 women lieutenants in the Naval service who could be subject to 10 U.S.C. 6401(a) (App. 17a);[7] that the 13-year selection out provision in

[5] Affidavit of Capt. E. R. Fink, JAGC, U.S.N. (App. 16a-26a); Affidavit of Rear Admiral G.E.R. Kinnear, U.S.N. (App. 26a-29a).

[6] Some 238 lieutenants were subject to mandatory discharge under 10 U.S.C. 6382 on June 30, 1972, 31 of whom were granted, after discharge, reserve appointments and retained on active duty pursuant to long-established policy within the Navy to retain officers who are within two years of retirement eligibility. Forbes affidavit (App. 9a).

[7] Women officers on active duty numbered 3,233 (as of November 1972). Of these, 733 were women line or staff appointees, regular (504) or reserve (229); and 2,500 were women members of the Nurse Corps or other integrated staff

10 U.S.C. 6401 for women lieutenants presently has the effect of counteracting other traditional barriers to full participation and promotional opportunity for women officers in the Naval service, including previous size and promotion limitations,[8] and continuing restrictions against service by women on combatant vessels and aircraft, 10 U.S.C. 6015 (App. 23a-24a); that if equalization should be absolutely required, a more appropriate form of equalization in terms of overall needs of the service would be to eliminate altogether the 13-year provision and open up more Navy positions to women officers, thus creating more promotional opportunity for women officers, rather than create an across-the-board 13-year selection out provision for all male Navy lieutenants (App. 22a, 25a); and that, because of fiscal limitations, the immediate effect of the court's order, if followed in related class action litigation, could be to jeopardize the retention (through the end of the present fiscal year) of 630 lieutenants (junior grade) (App. 24a-25a).

The court denied the government's motion for a new trial (J.S. App. F, p. 27a).

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corps, regular (702), temporary (1), or reserve (1,797). Fink affidavit (App. 25a-26a).

The Department of the Navy has provided statistics concerning the number of officers (male and female) serving on active duty as of September 30, 1973. We have included these statistics in Table I, *infra*, p. 21.

[8] See *infra*, p. 19, n. 28.

ARGUMENT

I

STATUTORY CLASSIFICATION BY SEX IS CONSTITUTIONAL IF RATIONALLY RELATED TO REASONABLE AND LEGITIMATE GOVERNMENT OBJECTIVES

The district court held that the difference in selection out rules for men and women officers was unconstitutional because it was not justified by a compelling government interest.[9] For its conclusion that such a compelling interest is required, the district court relied heavily on the opinion of four justices in *Frontiero* v. *Richardson*, 411 U.S. 677 (J.S. App. B, pp. 17a-19a). That such a showing is not required is now clear from the subsequently rendered decision in *Kahn* v. *Shevin*, No. 73-78, decided April 24, 1974. That case involved an effort by a male plaintiff to extend to himself the benefit[10] of a legislative provision which had the effect of offsetting

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[9] The court also found no "evidence of any facts supporting * * * a rational basis" (J.S. App. B, p. 18a). The reasons supporting the classification here which were not fully presented to the court prior to the Motion for a New Trial (J.S. App. C, pp. 21a-22a) are set out in Part II of this brief, *infra* pp. 11-19.

[10] We note that Section 6401 is not a "benefit" to all women officers. Women lieutenants subject to Section 6401 who have been passed over twice at nine years, and wish to leave the service immediately with severance pay (up to $15,000), cannot because they have not completed 13 years of commissioned service. To these officers Section 6401 is a "detriment." Cf.

social disabilities of women. In an opinion of six justices this Court held that such a statute is constitutional if it " 'rest[s] upon some ground of difference having a fair and substantial relationship to the object of the legislation.' " Slip op. at 4. Because, as we demonstrate in Part II of this brief, such considerations are present here, the decision of the court below was in error.

The decision of this Court in *Kahn* upheld a statutory $500 exemption for widows but not for widowers. It is in accord with a long line of this Court's decisions. *Muller* v. *Oregon*, 208 U.S. 412 (upholding State statute that limited women's working hours); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding State statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining State statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding State statute that relieved women of jury duty unless they volunteered); and *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (permitting State to provide separate branches for male and female college students).[11]

Two v. *United States*, 471 F.2d 287 (C.A. 9), certiorari denied, 412 U.S. 931.

[11] See also *Gruenwald* v. *Gardner*, 390 F.2d 591 (C.A. 2), certiorari denied, 393 U.S. 982 (sustaining disparity in federal social security retirement benefits favoring women); *Eslinger* v. *Thomas*, 476 F. 2d 225 (C.A. 4) (invalidating State resolution barring females from serving as Senate pages); *Robinson* v. *Board of Regents*, 475 F. 2d 707 (C.A. 6), certiorari denied, No. 73-221, May 13, 1974 (sustaining State college curfew requirement applicable only to females); *Miskunas* v. *Union Carbide Corp.*, 399 F. 2d 847 (C.A. 7), certiorari denied, 393 U.S. 1066 (sustaining State common law rule giving consortium cause of action to men but not women); *Brenden* v. *Independent School District*, 477 F. 2d 1292 (C.A. 8) (invalidating State rule preventing girls from participating in high school noncontact sports with boys); *Moritz* v. *C.I.R.*, 469 F. 2d 466 (C.A. 10), certiorari denied, 412 U.S. 906 (invalidating federal statute denying tax benefits to single males). Contra: *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.J.) (3-judge ct.) (mother's insurance benefits under the Social Security Act held discriminatory under compelling interest test). Compare *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La.) (3-judge ct.), probable jurisdiction noted, *Edwards* v. *Healy*, No. 73-759, February 19, 1974, (invalidating State statute exempting women from jury service who do not voluntarily register for it); *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Calif.) (3-judge ct.), probable jurisdiction noted, *Geduldig* v. *Aiello*, No. 73-640, February 17, 1973, (invalidating State statute excepting pregnancy-related work loss from unemployment insurance benefits).

It is particularly important in the context of this case that the courts accord to the legislature significant flexibility as to classification based on sex, because the issue here relates closely to the organization, maintenance, and effectiveness of the armed forces. In cases such as this the legislature's judgment as to military practicality requires deference. See U. S. Const., Art. I, Sec. 8, Cls. 12, 13 and 14; *Toth* v. *Quarles*, 350 U.S. 11, 17 ("primary business of armies and navies [is] to fight or be ready to fight wars should the occasion arise"); *Lichter* v. *United States*, 334 U.S. 742, 755-756 (conscription laws);

Orloff v. *Willoughby*, 345 U.S. 83, 94 (military considered a "specialized community governed by a separate discipline from that of the civilian"); *United States* v. *St. Clair*, 291 F. Supp. 122 (S.D. N.Y.) (draft laws do not unconstitutionally discriminate on the basis of sex).

This is not a rule like that held unconstitutional in *Frontiero* v. *Richardson*, *supra*, which denied fringe benefits to females solely for reasons of administrative convenience. Rather, this case involves policies closely related to the rate of promotion among younger officers and hence to the fighting morale and effectiveness of the armed forces.

In *Williams* v. *McNair*, 316 F. Supp. 134, 136-137 (D. S.C.), affirmed, 401 U.S. 951, the district court, in reviewing a sex classification statute in the civilian area (authorizing a State women's college), considered that any more stringent rule than the reasonable basis test "would mean that courts and not legislatures would determine [in these situations] all matters of public policy." The need to avoid such a function by the courts would apply *a fortiori* to questions involving the separate organization of men and women in the armed forces.[12]

[12] "It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed." *Bertelsen* v. *Cooney*, 213 F. 2d 275, 277 (C.A. 5), certiorari denied, 348 U.S. 856.

II

THE DIFFERENCES IN 10 U.S.C. 6382 AND 6401 ARE CONSTITUTIONAL

The different selection out rules of 10 U.S.C. 6382 and 10 U.S.C. 6401 are rationally related to reasonable and legitimate governmental interests and are therefore constitutional. We believe, in fact, that they can, though not required to do so, meet the more stringent test that they be supported by a compelling governmental interest. The differences in the two statutes are justified by the need to maintain a balanced and effective Naval officer corps. This is an appropriate, legitimate, and very important governmental objective.

The differences in the two statutes are based on a combination of complex factors, both historic and practical. The Navy, like the other military services, has traditionally been a male-dominated service;[12a] duty on board combatant vessels and aircraft is still

[12a] See Table I, *infra*, p. 21. As of September 30, 1973, a total of 15,034 lieutenants of the Navy serving on active duty (15,007 male and 27 female) were subject to the provisions of either 10 U.S.C. 6382(a) (9,990 regulars), or similar provisions of 10 U.S.C. 6389(a) (5,044 reserves); only 170 lieutenants (female) were subject to the provisions of 10 U.S.C. 6401. An additional 408 lieutenants of the Nurse Corps (76 male and 332 female) were subject to the provisions of 10 U.S.C. 6396(c) (166 regulars) or 10 U.S.C. 6397 (242 reserves), which are similar to 10 U.S.C. 6401. Temporary officers (including 546 temporary lieutenants) hold their appointments subject to termination by the President. 10 U.S.C. 5596(h).

restricted by statute to males, 10 U.S.C. 6015; male officers far outnumber female officers; and a system of orderly and assured promotion or selection out, based solely on fitness, has been considered by Congress to be essential for the maintenance of an efficient and motivated officer command structure. As of the present time Congress has not concluded that the services have arrived at the point where complete integration of male and female components, and the rules governing such components, can take place.[13]

1. 10 U.S.C. 6382 is part of a promotion system which governs most officers of the Regular Navy.[14] Competent line and staff officers of every rank are required in the operational units of the Navy (which are largely made up of combatant vessels) and in support, staff and specialized units. Congress fixes

[13] Had Congress believed that uniform treatment was required, it seems more likely that it would have made 10 U.S.C. 6382 applicable to women rather than extending, as the district court has done, the special provisions of 10 U.S.C. 6401 to men. Indeed, the Department of Defense has proposed elimination of 10 U.S.C. 6401 to Congress. See *infra*, page 18, n. 24.

[14] 10 U.S.C. 6382(a) governs all male lieutenants of the Regular Navy other than those in the nurse corps. It also governs women staff lieutenants of the Regular Navy in the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579). It does not govern women line and staff lieutenants appointed under 10 U.S.C. 5590, nor lieutenants (male or female) of the Nurse Corps.

Reserve officers are subject to elimination from active status under conditions similar to those prescribed for separation of regulars. See 10 U.S.C. 6389, 6397.

by statute the total number of personnel in the Navy. *E.g.*, P. L. 92-436, Section 301, 86 Stat. 735; 86 Stat. 1184; H. Rep. No. 1389, 92d Cong., 2d Sess., p. 48; 10 U.S.C. 5403-5405, 5406-5409. In addition to reviewing the ratio of officers to enlisted persons, Congress has set by statute the distribution of the total number of unrestricted line officers within the various grades above lieutenant. See 10 U.S.C. 5442(a). The Secretary has discretion to determine the ratio, within the total number of remaining junior officers authorized, of lieutenants, lieutenants (junior-grade) and ensigns. 10 U.S.C. 5442(e). Promotions are based on merit and, in the case of most officers, on vacancies in the next higher grade. 10 U.S.C. 5707, 5756, 5769.[15] Separate promotion systems are established for unrestricted line officers (those eligible to command at sea), restricted line officers (those not eligible to command at sea), and for staff officers (supply, medical corps, etc.). See 10 U.S.C. 5769(b), 5773.

[15] Since the Secretary has discretion to determine the ratio of lieutenants, lieutenants (junior grade) and ensigns, the requirement of 10 U.S.C. 5756 that promotions to the next higher grade depend on vacancies in that grade is subject to administrative adjustment through adjustment of the number of officers prescribed for that grade. The Secretary has fixed the number of lieutenants at a number which creates fewer vacancies in a particular year than the number of lieutenants (junior grade) eligible for promotion. Attrition from lieutenant (junior grade) to lieutenant is accomplished largely by release of Reserve lieutenants (junior grade) to inactive duty (following completion of their active duty contracts), and also by the mandatory discharge of Regular lieutenants (junior grade) twice passed over. 10 U.S.C. 6382(b).

Thus officers generally compete for promotion against officers of similar experience for the more limited vacancies which exist in the next higher grade. The selection out rule for lieutenants twice passed over—10 U.S.C. 6382(a)—is a necessary part of a system designed to limit the Naval service to the best qualified, and to assure timely promotion of qualified younger officers.

Section 6382(a) is a reenactment of Section 312(h) of the Officer Personnel Act of 1947, 61 Stat. 860, which, in turn, was derived from Section 12(c) of the Act of June 23, 1938, 52 Stat. 949. See S. Rep. No. 2120, 75th Cong., 3d Sess., p. 10; H. Conf. Rep. No. 2764, 75th Cong., 3d Sess., p. 4.[16] It is an essential part of the Navy's merit system of promotion, first adopted in 1916. As described in the Senate Report, No. 2120, *supra*, at p. 4, that selection system

[16] Earlier reforms of the naval officer promotion system (which originally was based solely on seniority) were enacted by the Act of July 16, 1862, 12 Stat. 583; Act of Aug. 29, 1916, 39 Stat. 556; Act of Mar. 3, 1931, 46 Stat. 1482; and Act of May 29, 1934, 48 Stat. 814. "The basic objectives of the * * * [1947 Act] were to provide a better opportunity for a reasonable career to the well qualified officer, to provide for greater equality of promotion opportunities by producing a more positive flow of promotion, to create a practical method to accelerate the promotion of outstanding officers in all grades, and to meet the increased need for specialization in certain fields." Seymour, *Promotion of Officers in the Naval Service*, 1956 JAG Journal 5, 6. See also H. Rep. No. 640, 80th Cong., 1st Sess.

The parts of the Officer Personnel Act of 1947 affecting naval officers were codified in 10 U.S.C. 5401, *et seq.* by the Act of Aug. 10, 1956, 70A Stat. 1, 297.

> provides first for the distribution of the total number of the officers by given percentages of the whole number in the several grades or ranks, fixed according to the needs of the Navy for officers of these respective grades of responsibility. These percentages, and the resultant numbers, are smaller for the upper ranks, since there are fewer officers needed in these higher grades, and more in the lower. The decrease in number from grade to grade is greater than the wastage, or attrition, through death, resignation, and physical disability retirement, of the graduating classes from the Naval Academy as they progress through their naval careers. In consequence it is impossible, without serious stagnation of promotion and its resultant delay in the progressive development of the abilities of officers through increasing responsibilities, to promote through all grades the surviving members of the original Naval Academy classes. * * *

10 U.S.C. 6382(a) meets these problems by establishing a mandatory attrition requirement for lieutenants twice passed over for promotion, thus permitting an even flow of promotion for most officers of the Navy through the grade of lieutenant.[17] Similar statutes provide for the retirement of officers higher than lieutenant who are twice passed over.[18]

[17] 10 U.S.C. 6382(b) requires the separation with severance pay of lieutenants (junior grade) who are twice passed over for lieutenant.

[18] See 10 U.S.C. 6380 (lieutenant commanders); 6379 (commanders); 6376 (captains). Retirement (with retirement pay) in lieu of discharge is justified because these officers are close to or are eligible for retirement. 10 U.S.C. 6381.

During normal peace-time conditions it is expected that a male lieutenant would complete about 13 years of commissioned service before he was passed over twice.[19] But Congress has permitted an acceleration of promotions for male officers to meet the rising need for officers during war-time conditions, as in the case of the recent conflict in Southeast Asia.[20] That conflict, and prior periods of international tension, have had the effect of reducing the promotion time for lieutenants, and the selection out time for those passed over twice, to eight or nine years.[21] In the post-war period the opposite trend may be expected, when the oversupply of officers created by the war is reduced. In these circumstances the selection out statutes applicable to male officers continue to serve a necessary purpose. A 13-year selection out period for twice passed over male lieutenants would

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Petitioner had prior enlisted service (J.S. App. B, p. 13a), and hence is close to retirement. His situation, however, is atypical. See Fink affidavit (App. 21a).

[19] See Section 308(a)(13) of the Officer Personnel Act of 1947, 61 Stat. 846; now 10 U.S.C. 5768(a) (12 year normal total commissioned service for male line lieutenants). Those lieutenants considered for promotion to lieutenant commander for the *second* time would attain 13 years of commissioned service. See Fink affidavit (App. 20a-21a). Connally affidavit (App. 10a).

[20] See 10 U.S.C. 5751(b), which fixes minimum service-in-grade requirements for consideration for promotion. (This section was suspended by the President in 1968 under the authority of 10 U.S.C. 5785(b). See Executive Order No. 11437, Dec. 2, 1968, 33 Fed. Reg. 17945.)

[21] Connally affidavit (App. 11a).

be detrimental to the needs of the service, and would be inconsistent with maintenance of a highly qualified and competitive Naval officer corps. The number of promotion opportunities for the grade of lieutenant would be lessened if twice passed over lieutenants were allowed to continue serving in that grade, in view of the requirement that promotion of lieutenants (junior grade) depend on vacancies by attrition or promotion in lieutenant ranks.

2. 10 U.S.C. 6401 is part of a separate promotion system which governs a relatively small number of women line and staff lieutenants in the Navy.[22] Under Section 6401 these lieutenants are presently subject to the same 13-year service tenure originally enacted in 1948 as the practical equivalent then to the peace-time selection out time for male lieutenants

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[22] 10 U.S.C. 6401(a) applies to women line and staff lieutenants on the active list (regulars appointed under 10 U.S.C. 5590). A similar statute applies to men and women lieutenants in the Nurse Corps (appointed under 10 U.S.C. 5580). 10 U.S.C. 6396(c). Both of these statutes operate if the lieutenant involved is "not on a promotion list" during the fiscal year in which 13 years of service is completed, requiring discharge at that time even if the lieutenant was never considered for promotion (rather than considered and passed over twice). See Fink affidavit (App. 21a). Women staff lieutenants of the medical, dental, judge advocate general, and medical service corps (appointed under 10 U.S.C. 5574, 5578, 5578a and 5579) are subject to the same attrition statute which applies to male lieutenants (10 U.S.C. 6382). See *supra*, p. 12, n. 14. Reserve women lieutenants (line, Staff, and Nurse Corps) are subject to elimination from active status under conditions similar to those prescribed for separation of regulars in these components. See 10 U.S.C. 6403, 6389, 6397.

twice passed over.[23] Congress may decide to amend this provision to conform to the selection out rules applicable to male lieutenants.[24] However, Congress has not yet done so, presumably because the retention for 13 years of women lieutenants (who have been passed over twice or otherwise have not been promoted) has not been considered inconsistent with the needs of the Naval service.[25] The lack of equivalent promotional opportunity for women in the past,[26] the relatively small number of women officers in the

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[23] 10 U.S.C. 6401, originally enacted as Section 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368, was so explained in Hearings before the Senate Committee on Armed Services, on S. 1103, S. 1527, and S. 1641, 80th Cong., 1st Sess., p. 39.

[24] The Department of Defense has submitted to the Congress a unifying bill which would, *inter alia*, substitute for Section 6401 the same provisions which govern Navy lieutenants generally (Section 6382). See Sections 2(5) and 4 (18)(L) of H.R. 12405 (93d Cong., 2d Sess.) (substituting a proposed new 10 U.S.C. 630 for 10 U.S.C. 6382 and 6401), pp. 41-42, 136. The Department of Defense considers that the separate rule for women, while serving a legitimate governmental purpose (providing additional career security for women officers of the Navy) is on balance no longer needed as a matter of military personnel policy. The bill is now pending before the House Armed Services Committee.

[25] The 1967 Act relating to women members of the armed forces made no changes to Section 6401. S. Rep. No. 676, 90th Cong., 1st Sess., p. 13.

[26] Women line and staff officers lack the combatant and sea duty of male officers, see 10 U.S.C. 6015, and accordingly have not only less competitive advantage as against line and staff male officers, but fewer command positions to which they could be promoted. See Kinnear affidavit (App. 28a). Since 1967 and within the women's promotion system, the Secretary

service,[27] and the public interest in increasing rather than decreasing the overall number of women in the armed forces, are substantial reasons in support of the differences in question.[28]

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of the Navy has initiated, as a matter of personnel policy, a program to accelerate the promotion of women, as authorized by 10 U.S.C. 5752. Today, because of Secretarial policy, women are considered for promotion within the same time periods as men.

[27] See *supra*, p. 5, n. 7, and the more recent statistics set forth in the addendum (Table I, *infra*, p. 21).

[28] In 1967 Congress repealed the prior restrictions on overall number of women in the Navy (enlisted and officers), restrictions against promotion to captain, and age limitations, and authorized the promotion of women, in certain circumstances, to flag rank. See Sections 1(14), 1(16), 1(18)(L), 1(19) and 1(24) of the Act of Nov. 8, 1967, 81 Stat. 374; S. Rep. No. 676, 90th Cong., 1st Sess. As a result, greater promotional opportunity will be available to women, with a consequent lessening of the necessity for Section 6401. However, it should be up to Congress, not the Courts, to determine when the objective of stabilizing career opportunities for women officers of the Navy, in the manner prescribed by Section 6401, is no longer necessary.

A 13-year tenure for women lieutenants does not jeopardize promotion of women lieutenants (junior grade), since all women lieutenants (junior grade) are eligible for promotion to lieutenant, regardless of the number of lieutenants, 10 U.S.C. 5760(b); Connally affidavit (App. 11a). By contrast, the Secretary must limit promotion of male lieutenants (junior grade) to vacancies existing in the lieutenant ranks. See *supra*, p. 13, n. 15.

Indeed, the differing ground rules governing the majority of women officers of the Navy, none of which are questioned here, strongly suggest that the two sexes are not "similarly situated," for purposes of invoking any claim of invidious discrimination. See *Wark* v. *Robbins*, 458 F. 2d 1295 (C.A. 1) (different penalties for escape from men's and women's prisons).

Accordingly, the distinction between 10 U.S.C. 6401 and 10 U.S.C. 6382 is constitutional.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

JEWEL S. LAFONTANT,
Deputy Solicitor General.

EDMUND W. KITCH,
Assistant to the Solicitor General.

ROBERT E. KOPP,
MICHAEL KIMMEL,
Attorneys.

JUNE 1974.

TABLE I

OFFICERS OF THE NAVY SERVING ON ACTIVE DUTY AS OF SEPTEMBER 30, 1973

(Derived from information prepared by Personnel Statistics Branch, Bureau of Naval Personnel, Department of the Navy, and appearing in tables reproduced in NAVPERS 15658)

Class		Component (and appointing authority-Regulars)	TOTAL OFFICERS: Regular[t] (incl. Temporary)	TOTAL OFFICERS: Reserve[r] (10 USC 591)	TOTAL OFFICERS: Total Officers	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Regular (10 USC 6382(a))	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Reserve (10 USC 6389(a))	LIEUTENANTS: Subject to separation under 10 U.S.C. 6382(a) or similar statute: Total	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Regular	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Reserve	LIEUTENANTS: Subject to separation under 10 U.S.C. 6401 or similar statute: Total	LIEUTENANTS: Temporary lieutenants—serve subject to 10 USC 5596(h)	LIEUTENANTS: Total Lieutenants
MALE OFFICERS	1.	Unrestricted line (10 USC 5572)	28,363	9,967	38,330	7,586	1,577	9,163	—	—	—	—	9,163
	2.	Restricted line (10 USC 5587, 5589)	6,260 (1396)	872	7,132	807	214	1,021	—	—	—	412	1,433
	3.	Staff—SC, CC, CEC (10 USC 5575, 5576, 5577, 5589)	5,106 (144)	1,616	6,722	959	281	1,240	—	—	—	35	1,275
	4.	Staff—MC, DC, JAGC, MSC (10 USC 5574, 5578, 5578a, 5579)	3,880 (388)	4,372	8,252	627	2,956	3,583	—	—	—	99	3,682
	5.	Staff—Nurse Corps (10 USC 5580)	69	235	304	—	—	—	39 (10 USC 6396(c))	37 (10 USC 6397)	76	—	76
	6.	Total Men	43,678 (1928)	17,062	60,740	9,979	5,028	15,007	39	37	76	546	15,629
WOMEN OFFICERS	7.	Line (10 USC 5590)	497	348	845	—	—	—	165 (10 USC 6401)	0 (10 USC 6403)	165	—	165
	8.	Staff—SC, CC, CEC (10 USC 5590)	15	18	33	—	—	—	5 (10 USC 6401)	0 (10 USC 6403)	5	—	5
	9.	Staff—MC, DC, JAGC, MSC (10 USC 5574, 5578, 5578a, 5579)	46	53 (10 USC 5581)	99	11	16	27	—	—	—	—	27
	10.	Staff—Nurse Corps (10 USC 5580)	673	1,434	2,107	—	—	—	127 (10 USC 6396(c))	205 (10 USC 6397)	332	—	332
	11.	Total Women	1,231	1,853	3,084	11	16	27	297	205	502	—	529
TOTAL	12.	Total Officers	44,909 (1928)	18,915	63,824	9,990	5,044	15,034	336	242	578	546	16,158

Notes

[t]—Temporary officers, appointed under 10 U.S.C. 5596, are included with regulars, and are separately indicated in parenthesis.

[r]—All reserves are appointed under 10 U.S.C. 591, except reserve women of the Medical, Dental, Medical Service and Judge Advocate General Corps, who are appointed under 10 U.S.C. 5581.

SC —Supply Corps
CC —Chaplain Corps
CEC—Civil Engineering Corps
MC —Medical Corps
DC —Dental Corps
JAGC—Judge Advocate General Corps
MSC—Medical Service Corps

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-796

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

CHARLES R. KHOURY, JR.
Attorney at Law
654 India Street Dock H
San Diego, California 92101

JOSEPH H. LEVIN, JR.
MORRIS S. DEES, JR.
CHARLES P. ABERNATHY
Attorneys at Law
119 South McDonough Street
Montgomery, Alabama 36104
Southern Poverty Law Center, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-766

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., APPELLANTS

V.

LT. ROBERT C. BALLARD, U.S.N. APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

Appellee adopts the statements of the opinion below, jurisdiction, constitutional provisions involved and questions presented as they are set forth in appellants' brief.

STATEMENT OF THE CASE

On June 30,1972, Lt. Ballard was scheduled to be discharged from the United States Navy after almost seventee (17) years of continuous active duty. That separation was under the mandate of 10 USC 6382. Lt. Ballard was not discharged on that date, however, since on June 16, 1972 he had filed suit in Federal District Court alleging that if he were a female line officer instead of a male line officer he would be guaranteed a thirteen (13) year tenure as a female lieutenant rather than two "pass overs" as a male lieutenant and that the extra three years or so of guaranteed service would give Lt. Ballard the necessary twenty (20) years to retire at half-pay and other benefits for the rest of his life. Those benefits were assessed at in excess of $200,000.00. The District Court issued a temporary

restraining order preventing Lt. Ballard's discharge. Affidavits were filed by both sides, Lt. Ballard's service record was introduced into evidence by the government. A preliminary injunction issued after a hearing in the District Court and Lt. Ballard's discharge was further enjoined pending a final decision (J.S. App. A). After the government filed an answer and additional affidavits and after trial before the three judge court, that court rendered a decision on June 26,1973.

The three judge court found that statute to be violative of the due process clause of the Fifth Amendment insofar as that statute directs the involuntary discharge of male U.S. Navy officers prior to the expiration of thirteen (13) years of commissioned service while 10 USC 6401 guarantees thirteen (13) years tenure to similarly situated female naval officers.

The court found that the legislatively guaranteed tenure time of commissioned service granted to women under §6401 is an inherently suspect classification and the effect of the tenure provision was to invidiously discriminate against similarly circumstanced male naval officers who are mandatorily discharged before completing thirteen years of commissioned service.

The three judge court did not limit itself to the compelling interest test but also applied the rational basis test and found no rational basis to support the tenure granted female and denied male naval officers under 10 USC 6401 and 10 USC 6382 (p.18(a) of App. B J.S.).

The three judge court further found that the provisions of 10 USC 6382 are "legislative fiscal outlay saving devices for the weeding out of a surplus of U.S.N.

officers in a given grade before the vesting of retirement benefits" (Opinion of the three judge court, p. 15(a) of App. B, J.S.)

The three judge court found on substantial evidence , that appellee Lt. Ballard had served over seventeen (17) years in the Navy as an officer and enlisted man; that he had served with overall outstanding fitness reports and had been recommended for promotion in all those fitness reports. The court further found that if he had been allowed to serve 13 years as a Lieutenant, as he would if he were a woman, he would receive retirement benefits of approximately $200,000.00 as opposed to the $15,000.00 severance pay he was to receive under 10 USC 6382.

After the written decision, appellants moved the court for a "new trial" on the basis of two new affidavits. (J.S. App.C,

p. 21a-22a) The motion was denied(J.S.App. F. p. 27(a)).

ARGUMENT

I

SCOPE OF THE ISSUES PRESENTED

The advisability or necessity of weeding out unpromoted Naval officers is not at issue in this appeal. Contrary to the assumption of a substantial portion of the government's brief, Lt. Ballard is is not asking the Navy to justify its "up or out" personnel policy. That policy serves not only substantial military-national security interests, it also serves the men and women in the Navy by guaranteeing an opportunity for promotion and a lessening of dead end job assignments. 1/

1/ See Seymour, Promotion of Officers in the Naval Service,1956 JAG JOURNAL 5,6; Brief for Appellants at 14 n.16,15.

Lt. Ballard therefore admits a substantial military interest in weeding out unpromoted officers. Cf. Orloff v. Willoughby,345 U.S. 83 (1952). In such matters the courts properly pay some deference to Congress' and the military's command decisions regarding what is best for the nation's security. See Bertelson v. Cooney, 213 F.2d 275,277 (5th Cir. 1954), cert. denied, 348 U.S. 856 (1955). Lt. Ballard, on the other hand, is not concerned with the advisability of selection-out policy, but rather with the introduction of an arbitrary factor -sex- into the promotion process. When such a constitutional attack is mounted, the Court must judge, without deference to military or Congress, whether the Constitution has been violated. Frontiero v. Richardson, 411 U.S. 677 (1973); Toth v. Quarles, 350 U.S. 11 (1955).

Of course, if some legitimate military

interest is found to support the sex classification drawn by Congress, then that would lead the Court to uphold the differing treatment of men and women by showing a compelling interest or even a rational basis for the statutory scheme. But the military's legitimate interest in weeding out of officers cannot be stretched and blurred, as the government attempts in its brief, to justify not only the selection out policy but the arbitrary sex classification. The weeding out policy applies to both men and women officers; the important question is whether sex is a pertinent consideration in deciding what procedures to apply in the weeding out process. This court very recently stated:

> We thus recognize that state recoupment statutes may betoken legitimate state interests. But these interests are not thwarted by requiring more even treatment....

James v. Strange, 407 U.S. 128, 141 (1972) (Emphasis added)

II

SEX-BASED DISTINCTIONS IN THE SELECTION-OUT PROCESS ARE WHOLLY IRRATIONAL

The statutes at issue here choose sex as the critical factor in applying the Navy's selection out policy. 10 U.S.C. § 6382 applies to "[e]ach officer . . . [when] he is considered as having failed of selection for promotion to the grade of lieutenant commander for . . . the second time." 10 U.S.C. § 6401 covers "[e]ach woman officer" whom the Navy wants to weed out. Sex by statutory design is therefore a significant factor in determining which selection out rules to apply.

It is difficult to ascertain with any sureness the specific factors on which the appellants rely to support this classification by sex. Their primary effort

appears to be to convince the Court that the statutes are "based on a combination of complex factors,"[2] factors so complex that the Court should not attempt to interfere with any isolated aspect. There is the hint that, unlike the issues in Frontiero v. Richardson, supra, "this case involves policies closely related . . . to the fighting morale and effectiveness of the armed forces," although it is never quite explained how the sex classification relates to the morale-boosting goal.[3] Despite having lost their case in the district court, the appellants see justification of the differing treatment as remarkably self-evident. One sentence is used to meet all constitutional objections:

2/ Brief for Appellants at 11.
3/ Id. at 10. It should be noted that both statutes -- the male and female provisions -- relate to the rate of promotion of young officers and hence both relate to naval morale. The issue is

> The lack of equivalent promotional opportunity for women in the past, the relatively small number of women officers in the service, and the public interest in increasing rather than decreasing the overall number of women in the armed forces, are substantial reasons in support of the differences in question. 4/

There is no discussion of precisely how these sex-based differing selection out procedures accomplish the above "goals".

A.

Indeed, any argument justifying the present statutes as remedial and protective legislation for women is plainly insubstantial. The sole difference in selection-out procedure is the number of years which are to be served before selection-out occurs. The protective and remedial aspects of setting a fixed time for women and a possibly speeded-up time

3/ (cont)
whether there is a reasonable basis for treating men and women differently in carrying out this "morale-boosting" policy.
4/ Id. at 19 (footnote omitted).

for men are tenuous and, more important, never intended by Congress.

Admitting that there are few women in the Navy and that they lacked promotional opportunity in the past, the fixed thirteen-year female selection-out statute in no way relates to or remedies those problems. After Kahn v. Shevin, ____U.S.____, 42 U.S.L.W. ____ (April 24, 1974), a number of existing statutes have suddenly acquired retoractive remedial purposes. The Court must decide which are legitimately remedial, as a wary consumer would sort true medicines out from the unsubstantiated elixirs.5/ In the present case an even casual reference to the legislative history of

5/ In great measure the drive for women's rights has been an attempt to escape the benevolent protection afforded by male-dominated society. See Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. REV. 675,697-702 (1971). See also UP FROM THE PEDESTAL (A.S. Kraditor ed. 1968).

§ 6401 shows that it is not a remedial statute. This section was originally enacted as § 207(j) of the Women's Armed Services Integration Act of 1948, 62 Stat. 368. Senate hearings on the bill clearly disclose that the purpose of the thirteen-year selection term for women was to duplicate what was then the same term for men.6/ As even the appellants concede,7/ therefore, Congress intended to put women on a substantial par with men on the selection-out issue. Section 6401 fails to give favor or protection for women because it was never designed or intended to have that effect.8/

6/ Hearings on S. 1103, S. 1527, & S. 1641 Before the Senate Committee on Armed Services, 80th Cong. 1st Sess. at 39. See Brief for Appellants at 16 & n. 19.

7/ Brief for Appellants at 17-18.

8/ The argument that §6401 was intended to remedy low female membership in the Navy and to provide increased advancement opportunitites over men, Brief for Appellants at 18-19, is further untenable

B.

A substantital portion of the Brief for Appellants is devoted to a description of the history and development of differing personnel policies for males and females in the Navy. Constitutional importance is attached to these personnel policies in a final footnote:

> Indeed, the differing ground rules governing a majority of women officers of the Navy, none of which are questioned here, strongly suggest

8/ (cont.) in light of the other provisions in the 1958 Act which limited the overall number of women, prohibited promotion for women beyond the level of lieutenant commander, and set age limits for women. These provisions were not eliminated until 1967. Act of Nov.8, 1967, 81 Stat. 374 § 1(14), 1(16), 1(18)(L), 1(19), 1(24). It is apparently the appellants' contention that while these direct prohibitions impeded the growth of female reserves, tiny § 6401 was all the time working, as intended, as a counter-force increasing the number of female personnel. In the repeal of the above prohibitions, the appellants see only a "lessening necessity" for the curative powers of §6401. Brief for Appellants at 19 n.28.

> that the two sexes are not "similarly situated" for purposes of invoking any claim of invidious discrimination.9/

The simple, and sufficient, response to this contention is that though men and women may not be similarly circumstanced with regard to other problems in the Navy, those different circumstances are irrelevant to the selection-out issue. Men generally have larger feet than women, but that does not make them dissimilarly circumstanced for weeding out purposes. The government makes no effort to argue that the other differing treatments according to sex are relevant to the issue sub judice.10/

9/ Brief for Appellants at 19 n.28

10/ As we discussed in the previous section, the interests supporting sex-oriented personnel decisions in other aspects of naval staffing -- such as the desire to increase number of females or restrict their jobs -- has an insubstantial relation to the narrow issue of setting a thirteen-year selection out date for women versus an approximate nine-year date for men.

The "differing ground rules" rationale is really only a variation of the administrative convenience argument advanced, and rejected, by the government in Frontiero v. Richardson, supra. Because we segregate women in other phases of Navy life, the appellants argue, it is easy for us to keep on treating them separately in administering our selection out system. As was the case in Frontiero, there is no evidence that the differing cut-off date for females' service is an easier administrative burden;[11] someone must still go through records to determine who failed promotion regardless of the year in which it is done.[12] In

11/ 36 L.Ed.2d at 593.

12/ Indeed, the separate categorization may add to the administrative burden by requiring multiple checking of records to determine who is eligible for mustering out in any given year.

In any event, administrative convenience will not justify a sex-based classification. Frontiero v. Richardson, supra, at 594 .

There is no evidence in this record that the administrative plan has a substantive policy impact. There is no evidence, for example, that the jobs performed by women lieutenants subject to § 6401 are in any way unique or different from those performed by men lieutenants. There is no evidence in this record showing that women lieutenants perform jobs requiring a fixed term, whereas males in the same type jobs must be treated with flexibility. While combat demands may call for an increased male officer supply, the statutory classification cuts beyond combat personnel and sweeps all males into one category for selection out purposes and the over-

whelming number of females into another category.[13] The argument that the variable selection-out term of males corresponds with combat needs is further undercut by the fact that some few women[14] officers are apparently subject to selection-out on the same basis as male officers; the jobs held by these women carry the professional status and respect associated with male-dominated occupations, but they require no participation in combat.[15]

13/ See Brief for Appellants, Table I (lines 7 and 8 vs. line 9).
14/ Less than five per cent of the women naval officers are subject to selection out under the same statute applied to males, 10 USC 6382(a). See Brief for Appellants, Table I, line 9.
15/ The disciplines involved are medicine and law. See Brief for Appellants, Table I, line 9.

C.

The appellants also argue that the relief accorded by the district court would, if extended in subsequent cases to all other male officers subject to selection out, interfere substantially with the Navy's personnel system and its combat readiness. Since the relief ordered allegedly interferes with combat readiness, the appellants intimate, reasoning backwards, that the statute eliminated by the district court must also have related to military preparedness.

The reasoning backward process fails in this situation where constitutional issues are at stake. Before President Truman's term, the armed services were substantially segregated internally according to race. Had that policy been adjudicated in this court it most certainly would have been held unconstitutional, and doubtless a

court order to desegregate the forces would have had a substantial adverse impact on military preparedness. But the policy, despite the relief order's disruptive effect on national defense, would have been unconstitutional and it would have been this Court's duty to declare it so. Cohens v. Virginia, 6 Wheat. 264 (U.S. 1821). 16/

There may be some disruption of the naval promotion system due to a finding that these statutory classifications are unconstitutional. While that may require that relief be tailored so as to interfere least with naval defense operations, it does not require that the statutes be

16/ Similar arguments were advanced in the early post-Brown school desegregation cases. School boards or governors regularly argued that the disruption occasioned by desegregation proved that the states had a legitimate educational interest in maintaining segregation. See Bush v. Orleans Parish School Board, 364 U.S. 500 (1960); Cooper v. Aaron, 358 U.S. 1 (1958); Southern Manifesto, RACE REL. L. RPTR. 435-47 (1956).

found constitutional and no relief granted.

III

THE RELIEF GRANTED BY THE DISTRICT COURT WAS APPROPRIATE;ALTERNATIVELY PLAINTIFF SHOULD BE RETAINED WHILE THE CONGRESS IS GIVEN AN OPPORTUNITY TO ACT

Whenever a court finds an unconstitutional classification and unequal treatment, it must then decide whether to remedy the defect by declaring the statute equally operative upon all persons similarly situated or by declaring the statute inoperative as to all of them. Skinner v. Oklahoma, 316 U.S. 535 (1942). In the present case the court must decide whether both male and female lieutenants will now be subject to §6401 or to §6382(a).

Congressional intent should guide the court on this issue. As Mr. Justice Harlan wrote in Welsh v. United States, 398 U.S. 333,355 (1970), the court is "to decide whether it more nearly accords with

Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intent, constitutional." See Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1939) (per Brandeis,J.); Brief for Appellants at 63-67 in Frontiero v. Richardson,supra.

Looking at Congress' actions on the selection our issue, it is of course clear that Congress legislated that the predominant number of naval officers should be governed by §6382(a), because men make up the majority of naval leaders.[17]/ It might be thought than that Congress would prefer that §6382(a)'s "twice failed" criterion be applied to both males and females. Such a conclusion is seriously eroded by Congress' understanding that "twice failing" would occur only after

17/ Brief for Appellants, Table I

thirteen years of service, for that is the statutorily prescribed service period for proceeding past the grade of lieutenant. See 10 USC §5768(a)(twelve year service time for lieutenants); Brief for Appellant at 16 n. 19. Congress so assuredly believed that "twice-failing" would take thirteen years, that it wrote that figure directly into the women's selection-out statute, 10 USC 6401, for the avowed purpose of making the female selection-out period equal to that of male lieutenants.[18]/

This fact supports the proposition that the court should follow the thirteen year period which Congress had in mind for both

18/As the appellants admit the speeded-up selection-out of male lieutenants has occurred because the President suspended Congress' time-in-grade requirements. This speeded up service has now become somewhat usual , but is clearly not what Congress foresaw. See Hearings, supra, note 6, Brief for Appellants at 16.

male and female officers at least until Congress decides otherwise.[19]/

IV

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF A PROPERLY PRESENTED FEDERAL QUESTION

In the court below the defendants were given two opportunities to argue the merits of their case. The court heard all parties before entering its preliminary injunction. (Memorandum Granting Preliminary Injunction, J.S. at 1a (Appendix A)). In that memorandum the court specifically directed that

> the defendant's are requested to file herein within thirty days from the date hereof, such Answer and further showing to the issues of plaintiff's complaint as they shall deem appropriate, else be in default herein. [Id.at 8a]

The defendants, however, failed to provide all their evidence for the scheduled trial on the merits, instead filing a Motion for New Trial in which a substantial

19/Cf. Brief for Appellants at 18 n. 24

portion of their evidence and argument was offered. Most of the information relating to the defendants' case was related in affidavits offered by Rear Admiral G.E.R. Kinnear, II, U.S.N. and Captain E.R. Fink, U.S.N. The defendants-appellants themselves must consider these affidavits crucial because they are relied upon in the brief on several occasions. Moreover, their Brief notes that the "reasons supporting the classification here which were not fully presented to the court prior to the Motion for a New Trial... are set out in Part II of this brief"; Part II comprises nine of the thirteen pages of appellants' brief which were devoted to "Argument." Brief for Appellants at 11-19.

For this court to consider these additional arguments and thus have before it all of the relevant evidence regarding

these statutes, the Court must first find that the district court erred in refusing to grant a new trial based on the new affidavits.[20] There can be no doubt, however, that the new trial motion was correctly denied. There were no specific grounds for a new trial asserted anywhere in defendants' motion or in the affidavit of Captain Fink attached thereto. Admiral Kinnear's affidavit was filed a full month after the Fink affidavit, after the filing of the Judgement, and after plaintiff had filed his opposition to the new trial. A motion for new trial grounded upon newly discovered evidence will not be granted unless the facts discovered are of such a nature that they would probably change the outcome; such facts are actually

20/ Defendants filed a separate notice of appeal in response to the court's refusal to grant a new trial. Jurisdictional Statement, Appendix G.

newly discovered and could not have been discovered earlier by proper diligence and the facts are not merely cumulative or impeaching (English v. Mattson, 214 F. 2d 406). Denial of defendants' motion for new trial based on affidavits which contained material in the nature of after-discovered evidence was not an abuse of the court's discretion where such evidence could have been discovered if due diligence had been exercised by the defendants (Niedland v. United States, 338 F.2d 254).

A perusal of the affidavit of Captain Fink, attached to defendants' motion (17(a) of Appendix) reveals no claim of newly discovered evidence.[21] The "evidence" re Ballard's fitness reports

21/Much of the affidavit and Appellants' brief is devoted to the assertion that some women were subject to 10 USC 6382 (p.22a of Appendix). The government has never stated, however, that any woman

in the Fink affidavit was simply in error and was sharply controverted in plaintiff's opposition to Motion for New Trial filed on July 16,1973. The defendants then and appellants now raise the spectre of millions of dollars of cost to the Navy if 10 USC 6382 is invalidated. The figures of those persons "affected" by the Ballard decision are no longer correct as only a small fraction of the alleged 204 officers in Ingram v. Richardson, 73-257-S, filed June 29,1973 have elected to stay in the service rather than be discharged under 10 USC 6382.

What appellants tried to do in their motion for new trial and again here in the Supreme Court is to use a Pandora's Box argument to sway the lower court from

21/(cont.) officer had been discharged pursuant to 10 USC 6382; therefore the three judge court's finding to that effect has never been challenged.

maintaining its ruling and this court from affirming that ruling. The problem is twofold in that the facts alleged are incorrect and secondly, they should be limited to Ingram v. Richardson, supra. Certainly, however, the appellants have not properly presented a federal question to this court by way of affidavits never tested by the rigors of trial. A dismissal[22]/ of this appeal then would still allow the defendants in Ingram v. Richardson supra to put their evidence, hastily attached to this case, to the test of trial and thereby present this court with an appellate record of a federal question properly presented and tried below.[23]/

22/ See DeBarker v. Brainard,396 US 28 (1969); Mattiello v. Connecticut,395 U.S. 209 (1969); Poe v. Ullman 367 U.S. 497 (1961).

23/ Lt. Ballard will have the 19 1/2 years service necessary to retire on or about February 16,1975. Congress is considering hearings on a bill which

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgement of the district court be either affirmed or that this appeal be dismissed for lack of a properly presented federal question.

CHARLES R. KHOURY,JR.

JOSEPH J. LEVIN,JR.

MORRIS S. DEES,JR.

CHARLES R. ABERNATHY

Attorneys for Appellee

AUGUST 1974

23/ (cont.)
ease the discrimination of 10 USC 6401, vest retirement equity at a 10 year point in active duty and make mandatory, instead of discretionary, retention when one is within 2 years of retirement. H.R. 12405, January 30,1974, 93d Congress, Second Session.

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LT. ROBERT C. BALLARD, U.S.N.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondent contends that the difference in selection out procedures reflected in 10 U.S.C. 6382(a) and 10 U.S.C. 6401 bears no rational relation to the needs of the service or to fair treatment of the individuals involved.

As discussed in our main brief, the difference in treatment results from the suspension of the normal time-in-grade provisions for male line and certain staff officers due to the continuing national emergency, and the resultant need for a rapidly expanding and effective fighting force.[1]

[1] It may seem anomalous that the need for a large force results in faster separation of those affected. However, the basic

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Congress recognized that the changing needs for male military officers—from whose ranks officers serving on combat vessels must be drawn—might require suspension of normal time-in-grade provisions for these officers in times of national emergency. 10 U.S.C. 5785. In fact, the provisions relating to time-in-grade for eligibility for promotion for these officers (10 U.S.C. 5751) are currently suspended by virtue of Executive Order No. 11437, Dec. 2, 1968, 33 Fed. Reg. 17945. This has the effect of enlarging the pool of lieutenants available for promotion to lieutenant commander, and thus permitting the rapid promotion of highly qualified officers. But the decision of the court below substantially interferes with this effect, since it requires retention in that pool of officers who have twice been determined to be less qualified for promotion than their peers. The decision thus results in the dilution of the overall quality of the available pool of officers; since less qualified individuals must be retained, more qualifed ones may not enter.[2]

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military promotion and separation procedure, as explained in our main brief, is based on the philosophy that an officer who is not considered by 2 selection boards to be among those best qualified for promotion must be separated, in order both to upgrade the service and to assure vacancies in grade to which those most qualified in the grade below may be promoted. Therefore, any acceleration in promotions necessarily involves a related acceleration in separations.

[2] The practical effect of the decision below—and the subsequent class actions to prevent the separation of naval lieutenants who were passed over for the second time in June of 1973 (*Ingram* v. *Schlesinger*, Civ. No. 73-257-S, S.D. Calif.) and June of 1974 (*Johnson* v. *Schlesinger*, Civ. No. 74-206-S, S.D. Calif.)—would be to require the Navy, in order to stay within force size limitations, to discharge naval officers in the lower grades

There is no such compelling need to separate women lieutenants appointed under 10 U.S.C. 5590 before the expiration of the 13-year period established by 10 U.S.C. 6401. Since women cannot serve on ships other than hospital ships and transports, or in aircraft engaged in combat missions, 10 U.S.C. 6015, they are ineligible for the jobs which fluctuate most with national emergencies. In addition, the disproportionately small number of female lieutenants subject to 10 U.S.C. 6401 compared to the male lieutenants subject to 10 U.S.C. 6382(a) and the related 6389(a)—about 170 as compared with about 15,000 (Gov. Br., p. 21, Table I)—means that the absolute number of women who may be retained because of the 13 year provision is too small to interfere significantly with the Navy's promotion procedures.

Section 6401, 10 U.S.C., providing that women lieutenants appointed under 10 U.S.C. 5590 are not subject to separation until they have 13 years of commissioned service, serves an important government interest in tending to correct the evident imbalance in the number of female officers as compared to males.[3]

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who were commissioned in the belief that the speed-up for national emergencies was valid. These potentially highly qualified officers would have to be released, in order to retain the lieutenants who have been passed over (App. 25A).

[3] In 1973, there were more than twenty times as many male officers as female (Gov. Br., p. 21, Table 1).

The difference in treatment granted certain women lieutenants is also justified by considerations of fairness to the individuals involved. Restrictions on promotions of women which limited their chances for advancement in the Navy were not removed until 1967 (Gov. Br., p. 19, n. 28). Consequently, the records of many women affected by the 13 year retention requirement of 10 U.S.C. 6401 reflect restrictions which existed until seven years ago.[4]

Moreover, due to the statutory prohibition on service on board combat vessels (10 U.S.C. 6015), many of the jobs available to male officers are still not available to women. In the competition with men for the jobs which are available to them, the women officers' records reflect their current narrower opportunities for service. For both these reasons, women remain at a disadvantage compared to men in obtaining the available line officer jobs in the Navy. The special provision in 10 U.S.C. 6401, permitting certain women lieutenants to serve 13 years before separation for failure to be promoted, is justified as tending to counteract this disparity. In the integrated corps, such as the Medical and Dental Corps, the Judge Advocate General's Corps, and the Nurse Corps, where there is no statutory difference in the jobs which men and

[4] For example, Lt. Two, a woman who challenged the constitutionality of 10 U.S.C. 6401, had eleven years of commissioned service before she was first considered for promotion to Lieutenant Commander. *Two* v. *United States*, 471 F. 2d 287, 288 (C.A. 9), certiorari denied, 412 U.S. 931.

women officers may fill, there is likewise no difference in the selection out procedures applicable to them (Gov. Br., p. 17, n. 22).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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